



UNIVERSITYof  
TASMANIA

**NGO compliance with treaty objects and  
purposes: the cases of the *Convention on the  
Conservation of Antarctic Marine Living  
Resources* and the *International Convention for  
the Regulation of Whaling***

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Submitted in fulfillment of the requirements for the degree of Doctor of Philosophy

University of Tasmania

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## Declaration of Originality

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis, and to the best of my knowledge and belief no material previously published or written by another person except where due acknowledgement is made in the text of the thesis, nor does the thesis contain any material that infringes copyright.

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All interviews and research conducted for this thesis conformed with the expectations and guidelines of the University of Tasmania Social Sciences Human Research Ethics Committee. All research was approved by the University of Tasmania Social Sciences Human Research Ethics Committee. Ethics Reference No: H0014221: Role of nongovernment organizations in the International Whaling Commission and the Commission for the Conservation of Antarctic Marine Living Resources.

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## List of abbreviations and acronyms

### A

ACAP – Conservation of Albatross and Petrel

ARK – Association of Responsible Krill Fishers

ASOC – Antarctic and Southern Ocean Coalition

AT – Antarctic Treaty

ATS – Antarctic Treaty System

ATCP – Antarctic Treaty Contracting Party

### C

CAMLR Commission – Commission for the Conservation of Antarctic Marine Living Resources

CAMLR Convention – Convention on the Conservation of Antarctic Marine Living Resources

COLTO – Coalition of Legal Toothfish Operators

CSI – Cetacean Society International

### D

DWAN – Dolphin and Whale Conservation Network

### E

EEZ – Exclusive Economic Zone

EU – European Union

### F

FSA – United Nations Agreement on Straddling Fish Stocks

### G

GGT – Global Guardian Trust

### H

HNA – High North Alliance

### I

ICB – Instituto de Conservación Ballenas

IFAW – International Fund for Animal Welfare

ICRW – International Convention for the Regulation of Whaling or ‘Whaling Convention’

IOS – Indian Ocean Whale Sanctuary

IPCC – Intergovernmental Panel on Climate Change



IRC – Japanese Institute for Cetacean Research

IWMC WCT – International Wildlife Management and Conservation/Consortium – World Conservation Trust

IUCN – International Union for the Conservation of Nature

IUPN – International Union for the Protection of Nature

IWC – International Whaling Commission or ‘Whaling Commission’

## *J*

JARPA (I and II) - Japanese Antarctic Research Programs

JCR – Japanese Cetacean Research Institute

## *N*

NGO – Non-government organisation

NRDC – Natural Resources Defense Council (NRDC)

## *O*

OCC – Organización para la Conservación de Cetáceos

## *P*

PEW – PEW Environment Group

PMC – Private Military Contractor

## *R*

RFB – Regional Fishery Body

RFBSN – Regional Fishery Body Secretariats Network

## *S*

SC – Scientific Committee

SAWS – South Atlantic Whale Sanctuary

SPWS – South Pacific Whale Sanctuary

SOWS – Southern Ocean Whale Sanctuary

## *T*

TRAFFIC – the Wildlife Trade Monitoring Network

## *U*

UNC – United Nations Charter or ‘the Charter’

UNCLOS – United Nations Convention on the Law of the Sea

## *V*

VCLT – Vienna Convention on the Law of Treaties or ‘Vienna Convention’

## W

WDC – Whale and Dolphin Conservation

Whaling Convention – International Convention for the Regulation of Whaling

Whaling Commission – International Whaling Commission

WCC- IUCN World Conservation Congress

WWF – World Wildlife Fund

## Z

ZPCSA – Zone of Peace and Cooperation of the South Atlantic

## Abstract

Non-government organisations (NGOs) are prominent and influential actors in all areas of international law. NGO behaviours in international treaty bodies have largely been the focus of governance rather than legal analysis. A legal analysis of the manner in which international treaties and treaty body rules affect NGO conduct has not been the subject of scholarship. This thesis presents a legal analysis framework that uses the objects and purposes of international treaties as a means of evaluating whether NGO behaviours comply with the expectations and animating principles of treaties.

This thesis evaluated NGO conduct in two regional fisheries bodies – the *Convention on the Conservation of Antarctic Marine Living Resources* ('CAMLAR Convention') and the *International Convention for the Regulation of Whaling* ('Whaling Convention'). The primary focus was on NGOs in the role of observer at annual or biennial Commission meetings, with a secondary focus on the intersessional conduct of NGOs. The methods used were primary and secondary research, object and purpose construction, treaty interpretation, and case study analysis. Surveys and interviews were conducted with NGO and state delegates attending the CAMLAR Commission and Whaling Commission.

As a result of applying the object and purpose analysis, this thesis found that NGO behaviours were more likely to reflect the treaty object and purpose where Commission rules and procedures demonstrated clear expectations for NGOs to support the work of the Commission according to its object and purpose. It also found that where NGOs had a predominantly environmental focus, the NGO behaviour was more likely to be non-compliant with the object and purpose and to undermine Commission decision-making.

The CAMLAR Commission and Whaling Commission presented contrasting cases, with the former experiencing high degrees of NGO compliance with the object and purpose, which appeared to result from clear expectations on NGO engagement. The Whaling Commission presented the opposite, with unclear expectations on NGOs in their engagement and extensive non-compliant NGO behaviours. These case studies demonstrate the importance of maintaining clear rules of engagement for NGOs attending Commission meetings and interacting with treaty bodies and their treaties in intersessional periods.

NGO behaviours in international treaty bodies should support effective decision-making in treaty bodies, according to the treaty's object and purpose. By referring to the common language of the object and purpose in assessing NGO behaviour, it is also possible to facilitate greater transparency in both state and NGO behaviours. The object and purpose analysis framework is applicable in any treaty body and supports the rule of law for states and NGOs alike.

# Chapter One

## Introduction

Non-government organizations (NGOs) are prominent actors in international law. How they interact with various treaty bodies in international law is the subject of significant scholarship, as is the question of whether they should be accorded legal status commensurate with, or similar to, that of states in international law. However, unexamined in the literature is the question of how NGOs interact with current treaties and their treaty bodies in terms of legality or respect for the rule of law. So, to this end, this thesis proposes and applies a legal analytical framework comprised of the principles of the object and purpose in a treaty in order to evaluate the contributions NGOs make to the substantive work of international treaty bodies. To allow for depth of analysis this thesis investigates non-government organization (NGO) conduct in two international treaty bodies with reference to the objects and purposes of the treaty bodies' respective treaties. The two international treaty regimes evaluated are the Whaling Commission under the *International Convention for the Regulation of Whaling* ('*Whaling Convention*') and the CAMLR Commission under the *Convention for the Conservation of Antarctic Marine Living Resources* ('*CAMLR Convention*'). This thesis evaluates whether NGO behaviours *do* demonstrate accordance with the object and purpose principles of each Commission's respective conventions before considering whether they *should* conform. It finally makes recommendations for amending the *Rules of Procedure* and *Rules of Debate* of the two Commissions to better align NGO engagement with the fundamental purposes of the Commissions.

### 1.1 The significance of the CAMLR Commission and Whaling Commission

The Food and Agriculture Organization (FAO) classifies the CAMLR Commission and Whaling Commission as regional fishery bodies (RFBs). The FAO Fisheries and Aquaculture Department defines RFBs as 'a group of States or organizations that are parties to an international fishery arrangement – work[ing] together towards the

conservation and management of fish stocks.’<sup>1</sup> According to the FAO there are 52 RFBs. These RFBs are classified according to their jurisdiction over fish stocks in seas, oceans or in coastal waters and Exclusive Economic Zones (EEZs).<sup>2</sup> The Whaling Commission and CAMLR Commission are two of six global or trans-ocean FRBs<sup>3</sup> and are also the only two that operate in the 20.33 million kilometres<sup>2</sup> of the Southern Ocean.<sup>4</sup> Unlike some other RFBs,<sup>5</sup> which were established by resolution of the FAO Council, the two Commissions were established by the governments party to the Conventions. ‘Commission’ is the nomenclature for treaty bodies established by this method.

The Southern Ocean is a unique area in regional fisheries; it is home to a variety of unique species – krill, fish, seals, whales, birds – and ecosystems.<sup>6</sup> It is also a significant research point for exploring the possible impacts of climate change.<sup>7</sup> The value of the

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<sup>1</sup> Food and Agriculture Organization (FAO), ‘Regional Fishery Bodies (RFB)’, *Regional Fishery Bodies* (2019) <http://www.fao.org/fishery/rfb/en>.

<sup>2</sup> FAO, ‘RFB Fact Sheets’, *Regional Fishery Body Secretariat Network: RFB Fact Sheets* (2019) <http://www.fao.org/fishery/rfb/en>.

<sup>3</sup> *Ibid.*

<sup>4</sup> The *Convention for the Conservation of Antarctic Seals*, opened for signature 01 June 1972, 11 ILM 251 (entered into force 11 March 1978) (‘*Antarctic Seals*’) has no treaty body performing regulatory functions, so is effectively inactive.

<sup>5</sup> See for example the Fishery Committee for the Eastern Central Atlantic (CECAF) established by the FAO Council in 1967: <http://www.fao.org/fishery/rfb/cecaf/en> (2019).

<sup>6</sup> Valerie J Loeb, ‘Climate variability and spatiotemporal dynamics of five Southern Ocean species’ (2015) 134 *Progress in Oceanography* 93; Jessica Melbourne-Thomas et al., ‘Optimal control and system limitation in a Southern Ocean ecosystem model’ (2015) 114 *Southern Ocean Dynamics and Biogeochemistry in a Changing Climate, Deep-Sea Research Part II* 64; Szymon Surma, Evgeny Pakhomov and Tony J Pitcher, ‘Effects of Whaling on the Structure of the Southern Ocean Food Web: Insights on the “Krill Surplus” from Ecosystem Modelling’ (2014) 12(9) *PLOS ONE*; George A Knox, *Biology of the Southern Ocean* (Knox, 2006).

<sup>7</sup> Julian Gutt et al., ‘The Southern Ocean ecosystem under multiple climate change stresses – an integrated circumpolar assessment’ (2015) 21 *Global Change Biology* 1434; Andrew J Constable et al, ‘Climate change and Southern Ocean ecosystems I: how changes in physical habitats directly affect marine biota’ (2014) 20 *Global Change Biology* 3004; Paul GK Rodhouse, ‘Role of squid in the Southern Ocean pelagic ecosystem and the possible consequences of climate change’ (2013) 95 *Deep Sea Research Part II: Topical Studies in Oceanography* 129; Paul Newman et al., ‘The Effects

Antarctic also lies in its capacity to facilitate international cooperation in scientific and peaceful endeavours under the Antarctic Treaty System (ATS).<sup>8</sup> Beyond these unique qualities, both Commissions provide insight into regulatory practices in RFBs that could be applicable to other RFBs in their engagement with NGOs.

Within the context of fisheries and the Southern Ocean, the CAMLR Commission provides insights into the operation of both the ATS and RFBs. While the Commission is specifically housed within the ATS framework, it is considered an RFB in broader international law, and is also considered to be an example of best practice in marine conservation initiatives.<sup>9</sup> The Whaling Commission provides insights into an NGO-dense RFB. The Commission struggles to address modern issues of non-state engagement, and polarised approaches to a highly charged environmental issue – whaling. With the 2019 withdrawal of one of its founding members, Japan, from its membership,<sup>10</sup> the Commission also demonstrates the difficulties associated with non-state engagement, as

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of Interactive Stratospheric Chemistry on Antarctic and Southern Ocean Climate Change in AOGCM’ (NASA Technical Reports, NASA Center for Aerospace Information (CASI), Fall Meeting, 2014); Neil Adams, ‘Climate Trends at Macquarie Island and Expectations of Future Climate Change in the Sub-Antarctic’ (2009) 143(1) *Papers and Proceedings of the Royal Society of Tasmania* 1.

<sup>8</sup> *Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) Articles I and II (*‘Antarctic Treaty’*). “‘Antarctic Treaty system’ means the *Antarctic Treaty*, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments’ (Protocol on Environmental Protection to the Antarctic Treaty, Article 1(e)).

<sup>9</sup> The Food and Agriculture Organization body, Regional Fishery Body Secretariats Network (RSN) clearly places the CAMLR Commission within its membership: FAO, ‘RFB Fact Sheets’, *Regional Fishery Body Secretariat Network: RFB Fact Sheets* (2019) <http://www.fao.org/fishery/rfb/en>; Denzil Miller and NM Slicer, ‘CCAMLR and Antarctic conservation: The leader to follow?’ in Serge M Garcia, Jake Rice and Anthony Charles (eds), *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Coevolution* (Wiley, 2014) 253; Marika Ceo et al, *Performance Reviews by Regional Fishery Bodies: Introduction, Summaries, Synthesis and Best Practices. Volume I: CCAMLR, CCSBT, ICCAT, IOTC, NAFO, NASCO, NEAFC*, FAO Fisheries and Aquaculture Circular No. 1072, FIPI/C1072 (En) (Rome, 2012) 12, 13, 65, 78.

<sup>10</sup> International Whaling Commission, *Statement on Government of Japan Withdrawal from the IWC* (14 January 2019) International Whaling Commission <https://iwc.int/statement-on-government-of-japan-withdrawal-from-t>; Peter Bridgewater, ‘Japan leaving the International Whaling Commission is a disaster, but not for the reasons you think’ *ABC News Online* (31 December 2018).

NGOs have been, in part, blamed for Japan's exit.<sup>11</sup> This makes analysis of NGO engagement particularly relevant, relevant both with the increasing polarisation of environmental politics and to inform future engagement with NGOs for the Whaling Commission.

Object and purpose analysis of NGO behaviours in these two Commissions could be a useful tool for treaty bodies engaged with the conservation and management of highly migratory and non-migratory marine resources. Work areas of particular relevance are highly migratory fish stocks and marine mammals, both significant for management in international law,<sup>12</sup> and fisheries resources management in distinct geographical areas.<sup>13</sup> The analysis is relevant to other RFBs that currently engage or are considering engagement with NGOs in fisheries conservation and management.

## 1.2 The significance of NGOs

NGOs are important actors in international institutions. They affect decision making among states and in intergovernmental organizations (IGOs).<sup>14</sup> In the international

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<sup>11</sup> Peter Bridgewater, 'Japan leaving the International Whaling Commission is a disaster, but not for the reasons you think' *ABC News Online* (31 December 2018).

<sup>12</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1883 UNTS 3 (entered into force 16 November 1994) Articles 64 and 65, Annex I ('*Law of the Sea Convention*'); *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001); Marcos A Orellana, 'The Law on Highly Migratory Fish Stocks: ITLOS Jurisprudence in Context' (2004) 34 *Golden Gate University Law Review* 459; Cassandra M Brooks, 'Challenging the 'Right to Fish' in a Fast-Changing Ocean' (2014) 33(3) *Stanford Environmental Law Journal* 289, 290, 293-295; Austin Dieter, 'From Harbor to High Seas: An Argument for Rethinking Fishery Management Systems and Multinational Fishing Treaties' (2014) 32(4) *Wisconsin International Law Journal* 725, 731, 736; Dalal Al-Abdulrazzak et al, 'Opportunities for improving global marine conservation through multilateral treaties' (2017) 86 *Marine Policy* 247; Emanuele Bigagli, 'The international legal framework for the management of the global oceans social-ecological system' (2016) 68 *Marine Policy* 155.

<sup>13</sup> Many RFBs focus on non-migratory fish stocks. The work of the CAMLR Commission on fish stocks in designated management areas aligns closely with such work.

<sup>14</sup> Shamima Ahmed, 'The Impact of NGOs on International Organizations: Complexities and Considerations' (2010-2011) 36 *Brooklyn Journal of International Law* 817, 820;



arena they have been credited with representing otherwise unrepresented polities and demographics.<sup>15</sup> NGOs are also credited with facilitating transparency and accountability of institutions otherwise inaccessible to the public through their observation and presence at institutional meetings.<sup>16</sup> NGOs also contribute funds, expertise, and resources that may not be otherwise available to states and IGOs.<sup>17</sup> They provide access for states and international organizations to informal and/or non-state networks to facilitate the implementation of policies and projects, particularly across

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Peter Dauvergne, *Handbook of Global Environmental Politics* (at 2012) 'International environmental regimes as decision machines'.

<sup>15</sup> Steve Charnovitz, 'The Illegitimacy of Preventing NGO Participation' (2011) 36(3) *Brooklyn Journal of International Law* 891, 894; Jens Steffek, 'Explaining cooperation between IGOs and NGOs – push factors, pull factors, and the policy cycle (2013) 39 *Review of International Studies* 993, 993; Daniel Berlin, 'The Key to Green Power – Explaining NGO-Influence in Global Environmental Governance Structures' (August 11-13, 2005 NISA-NOPSA Conference, Reykjavik) *Globalization as Individualization and Destabilization Workshop* 16-17; see *contra*: Peter Willetts, 'The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy? (2006) 12(3) *Global Governance* 305, 315.

<sup>16</sup> Charnovitz, 'Illegitimacy', above n 15; Dana Brakman Reiser and Claire R Kelly, 'Linking NGO Accountability and the Legitimacy of Global Governance' (2011) 36 *Brooklyn Journal of International Law* 1011, Part I. Regulators, Legitimacy and Accountability; Allen Buchanan and Robert O Keohane 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics and International Affairs* 405, 428; Willetts, 'The Cardoso Report', above n 15.

<sup>17</sup> Charnovitz, 'Illegitimacy', above n 15; Alex Grigorescu, 'The Governmental-Nongovernmental nexus in Global Governance' (January 7-9, 2016, San Juan, Puerto Rico) *Paper prepared for the Annual Meeting of the Southern Political Science Association* 10; Daniel Berlin, 'The Key to Green Power – Explaining NGO-Influence in Global Environmental Governance Structures' (August 11-13, 2005 NISA-NOPSA Conference, Reykjavik) *Globalization as Individualization and Destabilization Workshop* 2.

borders.<sup>18</sup> They take an ethical, political, and/or moral standpoint in international dialogue to open up debate,<sup>19</sup> and develop political will.<sup>20</sup>

Despite these significant practical contributions made by NGOs in international forums, there is no discussion in the literature of NGOs in terms of the legal expectations on or legal boundaries around their participation within treaty regimes. For example, Steve Charnovitz discusses the exclusion of NGOs but not how engagement of NGOs is regulated.<sup>21</sup>

Karsten Nowrot writes about what NGOs have done in international forums, but not the structures enabling engagement.<sup>22</sup> She, as well as many others, also writes on the nature or existence of international legal personality of NGOs in international law<sup>23</sup> but

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<sup>18</sup> Charnovitz, 'Illegitimacy', above n 15; Dorothy C Zbicz, 'Imposing Transboundary Conservation' (2003) 17(1-2) *Journal of Sustainable Forestry* 21, 35; Gloria Yolanda Guevara, *Assessing the Effectiveness of Transnational Activism: An Analysis of the Anti-Whaling and Anti-Sealing Campaigns* (Doctoral Thesis, University of Southern California, 2008) 2-10, 148-149, 155; Kerstin Martens, 'Examining the (Non-)Status of NGOs in International Law' (2003) 10 *Indiana Journal of Global Legal Studies* 1, 5, 21; Vivek Kumar Mishra, 'The Role of Global Civil Society in Global Governance' (2012) 3 *Beijing Law Review* 206, 208-209.

<sup>19</sup> Charnovitz, 'Illegitimacy', above n 15, describes NGOs as 'correct[ing] for the pathologies of governments and IOs.'; LA Langley, 'Global Civil Society and Global Governability' in RD Germain (ed.), *The Idea of Global Civil Society: Politics and Ethics in a Globalizing Era* (Routledge, 2005); Mishra above n 18, 210.

<sup>20</sup> Charnovitz, 'Illegitimacy', above n 15, 894-895; BK Woodward, 'Global Civil Society and International Law in Global Governance: Some Contemporary Issues' (2006) 8 *International Community Law Review* 247 265 citing the Cardoso Report: Fernando Henrique Cardoso, *We the peoples: civil society, the United Nations and global governance; Report of the Panel of Eminent Persons on United Nations-Civil Society Relations*, UNGAOR, 58<sup>th</sup> sess, Agenda Item 59, UN Doc A/58/817 (11 June 2004).

<sup>21</sup> Charnovitz, 'Illegitimacy', above n 15, which discusses issues of NGO exclusion but not how to regulate their engagement.

<sup>22</sup> Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' (1999) 6 *Global Legal Studies* 579, 589-595.

<sup>23</sup> Nowrot, above n 22, 589-595; Bosire Maragia, 'Almost there: Another way of conceptualizing and explaining NGOs' quest for legitimacy in global politics' (2002) 2 *Non-State Actors and International Law* 301, 308 who writes that the general recognition of NGOs indicates a 'quasi or a limited form of international legal personality.'; and generally, it is recognised that non-state actors have limited legal

not the current status of NGOs engaging with legal frameworks. Alan Hemmings, writing on non-state actors in the Southern Ocean, provides a simple overview of the domestically administered laws regulating non-state actors in the Antarctic generally, and a brief overview of the restricted formal roles of NGOs at meetings of Antarctic Treaty bodies. However, he provides no analysis.<sup>24</sup> Dinah Shelton explores the mechanisms by which NGOs have been enabled to engage with international courts,<sup>25</sup> however this does not extend to either of the judicial forums, the Law of the Sea Tribunal and the International Court of Justice (ICJ), to which member states of the two Commissions could be subject. In short, legal analysis of NGOs is restricted to the existence of international legal personality and judicial standing. Neither discussion applies directly to the subject matter at hand.

NGO behaviours are discussed extensively in governance literature.<sup>26</sup> These are important discussions, and scholars address issues such as the accountability and

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personality in international law: Stephen Hall, *Principles of International Law* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2014) [4.2-4.3]; see also discussion in Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law* (Ashgate, 2010) 69; Janne E Nijman, 'Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law* (Ashgate, 2010) 91; Noemi Gal-Or, 'Observations on the Desirability of an Enhanced International Legal Status of the Non-State Actor' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law* (Ashgate, 2010) 125.

<sup>24</sup> Alan D Hemmings, 'The Changing Face of Non-State Actors in Antarctica' (2014) 32(3) *Antarctic* 30, 30-32.

<sup>25</sup> Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *The American Journal of International Law* 611, 641-642.

<sup>26</sup> Anton Vedder, 'Chapter 1. Questioning the legitimacy of non-governmental organizations' in Anton Vedder (ed), *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Brill, 2007) 1; Vivien Collingwood and Louis Logister, 'Chapter 2. Perceptions of the legitimacy of international NGOs' in Anton Vedder (ed), *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Brill, 2007) 21; Jennifer Brass et al, 'NGOs and international Development: A Review of Thirty-Five Years of Scholarship' (2018) 112 *World Development* 136; Carolei Domenico, 'Survival international v. World Wide Fund for Nature: Using the OECD Guidelines for Multinational Enterprises as a Means of Ensuring NGO Accountability'

legitimacy of NGOs in their engagement with international bodies. Charnovitz memorably writes that the role of NGOs is to 'correct for the pathologies of governments and IOs [international organizations]'.<sup>27</sup> More concretely, Peter Willetts notes the issue of representativeness in relation to the influence of NGOs in international law.<sup>28</sup> Nowrot acknowledges the significant need for limits on NGO influence.<sup>29</sup> Charnovitz traverses the two centuries of influence exerted by NGOs in shaping international law,<sup>30</sup> citing various means by which NGOs have affected decision making in various forums. This includes the International Committee for the Red Cross influencing the recognition of rape as a war crime under the *Geneva Conventions*.<sup>31</sup>

In their fundamentals, governance issues are intimately related to questions of legal regulation and what is considered acceptable conduct of NGOs in terms of international law.<sup>32</sup> To ensure certain standards of applicants for observer status, most international treaty bodies require civil society applicants to demonstrate legal incorporation that ensures transparency of governance structures, and NGOs are generally compliant. However, there remain questions of legitimacy, transparency and accountability of NGOs to treaty bodies,<sup>33</sup> and attaining a fair balance of perspectives in NGO

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(2018) 18(2) *Human Rights Law Review* 371; Steve Charnovitz, 'Recent Scholarship on NGOs' (2009) 103(4) *the American Journal of international Law* 777.

<sup>27</sup> Charnovitz, 'Illegitimacy', above n 15, 894.

<sup>28</sup> Peter Willetts, 'From Stockholm to Rio and beyond; the impact of the environmental movement on the United Nations consultative arrangements for NGOs' (1996) 22 *Review of International Studies* 57, 58, 60-61.

<sup>29</sup> Nowrot, above n 22, 580.

<sup>30</sup> Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 *Michigan Journal of international Law* 183, later he revises it to 100 years of influence: Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *The American Journal of International Law* 348, 349.

<sup>31</sup> Charnovitz 'Nongovernmental Organizations', above n 30, 353.

<sup>32</sup> Jens Steffek, 'Explaining cooperation between IGOs and NGOs – push factors, pull factors, and the policy cycle (2013) 39 *Review of International Studies* 993, 993-994; Rephael Harel Ben-Ari, *The Normative Position of International Non-Governmental Organizations under International Law. An Analytical Framework* (Martinus Nijhoff Publishers, 2012).

<sup>33</sup> Charnovitz, 'Illegitimacy', above n 15, 893.

representation.<sup>34</sup> There also remains the question of how NGOs have contributed to RFBs, as there is little extant literature on this question,<sup>35</sup> and none specifically on how RFBs engage NGOs through their legal documents.

The capacity of NGOs to influence decision making in international forums should be subject to legal analysis. This thesis contributes an original proposal for the evaluation of NGO behaviours in international treaty bodies through a legal analysis framework. This can be applied to NGOs as both formal and informal actors. This includes NGOs engaging as protesters, NGOs engaging as accredited observers, and NGOs using “in the margins” spaces to promote their agenda to other NGOs and member states. The significance of this contribution is that it is the first in an otherwise governance scholarship dominated field.

An object and purpose legal analysis framework is elaborated for use in determining whether formal and informal NGO engagement adheres to the fundamental principles and purposes of the treaty body. The object and purpose analysis framework provides an objective means of evaluating NGO behaviours within the two Commissions. The reference point for analysis is the text of the treaty itself and is readily accessible to legal and other scholars as a touchpoint.

Two limitations should be noted. Firstly, the analysis is directed only to NGOs in RFBs. This limits the findings to a small but important area of international law – both topically and geographically. However, this limitation may be overcome with further research and application to other areas of international law or geographies of RFBs. These possibilities are explored in the concluding chapter. Secondly, NGOs in the Whaling and CAMLR Commissions are only evaluated in the roles that are separable from their domestic state engagement. This means that NGOs on member state delegations are not evaluated under the analysis framework. Informal NGO engagement – both at Commission meetings and the intersessional periods, is evaluated. Most

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<sup>34</sup> Charnovitz ‘Nongovernmental Organizations’, above n 30, 367.

<sup>35</sup> See the doctoral dissertations: Liza Danielle Fallon, *The Role of State and Non-state Actors in the Management of the Patagonian Toothfish (*Dissostichus eleginoides*)* (Doctoral thesis, University of Tasmania, 2007) and Gloria Yolanda Guevara, *Assessing the Effectiveness of Transnational Activism: An Analysis of the Anti-Whaling and Anti-Sealing Campaigns* (Doctoral Thesis, University of Southern California, 2008).

significantly for any other treaty bodies, the role of observer is evaluated. The status of observer is a common role for NGOs in a variety of international treaty bodies. So, while there are limitations to the analysis, the analysis itself demonstrates transferability to other similar roles in other areas of international law.

### 1.3 The object and purpose analysis framework

The reason for using the object and purpose of a treaty as the basis for an analysis framework lies in its fundamental importance to the work of international bodies. The object and purpose of a convention is a central tool of interpretation.<sup>36</sup> Treaty interpretation and a treaty's object and purpose are at the centre of most disputes around state obligations.<sup>37</sup> Interpretation of articles of a convention is a significant action in international law, undertaken for the purposes of supporting the rule of law, achieving legal certainty<sup>38</sup> and giving effect to the sovereign agreement of States.<sup>39</sup> Martti Koskeniemmi argues that states drafted and agreed to the expression of their will in a treaty and should therefore 'know their will', making later interpretive disputes

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<sup>36</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*Vienna Convention*') Article 31(1); Ian Brownlie, *Principles of Public International Law* (Oxford, 7<sup>th</sup> ed, 2008) 631-636.

<sup>37</sup> Malgosia Fitzmaurice, Elias Olufemi and Panos Merkouris(eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, 2010); Philippe Sands and Jeffery Commission, "Treaty Custom and Time: Interpretation/Application?" in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, 2010) 39.

<sup>38</sup> UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* UN Doc S/2004/616 (23 August 2004); *Charter of the United Nations*, Article 2(1).

<sup>39</sup> FH Hinsley, *Nationalism and the International System* (Oceana Publications, 1973) 5; Roland Axtmann, 'The State of the State: The Model of the Modern State and its Contemporary Transformation' (2004) 25(3) *International Political Science Review* 259; David A Lake, 'The New Sovereignty in International Relations' (2003) 5 *International Studies Review* 303, 305-306; Frank Xaver Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, 2000); Max H Hulme, 'Comment: Preambles in Treaty Interpretation' (2016) 164 *University of Pennsylvania Law Review* 1281, 1282.

absurd.<sup>40</sup> The passage of time and unanticipated or complex circumstances make this an abstract criticism; new diplomats and new circumstances may account for disputes over interpretation, as may political interests as they evolve over time.<sup>41</sup> Whatever the cause of a dispute over the interpretation of an aspect of an international convention, the object and purpose is central to its interpretation by states, IGOs, and by courts and tribunals.

The object and purpose is significant because states bind themselves to the legal obligations they have created and ratified, acceded to, or succeeded to. As a substantive aspect of a treaty, the object and purpose is a measure of the legality of a state's behaviour, and part of the interpretative process. States presumably like to know the specifics of what a treaty binds them to, and generally why it does so. The object and purpose provides a reference point to understand the *why* of a treaty, and to animate the *what* of a treaty organization's work.

Just as the object and purpose can be used to measure the legality of a state's behaviour, it can also be used to measure the propriety or compliance of a non-state actor's behaviour in relation to the treaty. The significance here rests on the need to ensure that non-state actors, particularly NGOs, contribute to the work mandated under a convention, consistent with the object and purpose. This brings to the fore the underlying logic of a treaty as a valuable tool for directing NGO engagement, particularly where other mechanisms, such as voting structures, membership and *Rules of Procedure* provide inconsistent means of measuring or governing behaviour.

In developing the object and purpose analysis framework, the use of established interpretative methods was paramount to provide as broadly applicable, and as faithful a construction of the conventions as possible. In applying the analysis framework, two questions were foremost:

1. In interacting with treaty bodies, are NGOs guided by the object and purpose principles of the treaty?

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<sup>40</sup> Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 1989) 298.

<sup>41</sup> David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43(3) *Vanderbilt Journal of Transnational Law* 565, 582.

2. Can NGO behaviours be assessed by this standard to promote effective engagement?

And, as with most human undertakings, one more question arose:

3. If NGO behaviour can be regulated according to the object and purpose principles, should it be?

While it may appear desirable to require NGOs to act in accordance with a treaty's object and purpose, it is possible that applying this approach could constrain the capacity of NGOs to agitate for reform, to challenge or question international decision-making, or even present a 'non-government' perspective. Requiring compliance with the object and purpose of a treaty may restrict the ability to present moral, ethical or political viewpoints. It may also minimise the NGO's representative capacity by restricting the scope of engagement to those principles underlying a treaty.

However, in considering the specifics of NGO engagement, there are likely to be more neutral or positive outcomes. In terms of neutral outcomes, current valued NGOs roles such as relationship-building, resource sharing, or promoting transparency and accountability are unlikely to be negatively impacted. Relationship-building and resource sharing are generally important at the implementation phase of the work of IGOs, and object and purpose principles underlying IGO work will already have been considered before this time.

There are several possible positive outcomes. Guidance from the object and purpose will assist transparency and accountability roles. It will provide a common language for communicating with stakeholders, states and IGOs alike. It will also allow NGOs to refer to the rule of law in undertaking transparency and accountability roles – holding states accountable to their legal obligations is a central pursuit of NGOs in international law.<sup>42</sup> Lastly, the capacities to present non-state viewpoints and represent a polity may be enhanced by object and purpose-based guidance. The principles can aid in articulating an NGO position, and align their work with the work of an IGO, by making their position clear to the IGO, its member states and the NGO's polity in similar language.

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<sup>42</sup> 'Charnovitz, 'Illegitimacy', above n 15; Brakman Reiser and Kelly, above n 16; Buchanan and O Keohane, above n 16; Willetts, 'The Cardoso Report', above n 15.



The contribution of this thesis is largely practical. In considering the engagement of NGOs in the two Commissions it became clear that the implementation and wording of the *Rules of Procedure* and the *Rules of Debate* were the key to regulating the nature of NGO engagement. The congruence of the *Rules* with the content of the conventions, both in terms of substantive Articles on non-state engagement and the object and purpose, bore a clear relation to the functionality of the *Rules* in ensuring NGO compliant behaviour. While it became clear that there were serious questions of functionality in the Whaling Commission *Rules*, there were also some aspects of the CAMLR Commission *Rules* that could bear improvement. Amending for context, the discussions and amendments could also be of relevance to other international treaty bodies that wish to ensure NGOs support the effective work of their governing body.

The thesis makes a small but original contribution to scholarship addressing NGOs in international law. While NGOs are not parties to international treaties or members with voting rights, NGOs have attained prominence and influence in international law, yet their regulation is not widely discussed in terms of the legal parameters of their roles. Secondly, it contributes to the body of knowledge relating to NGO behaviours in international fisheries law by evaluating the ways in which legal frameworks affect NGO behaviours in their interactions with RFBs. The scholarship on NGOs in international law has hitherto been dominated by governance analysis.<sup>43</sup> Thirdly, this thesis will contribute to Southern Ocean resource governance literature, offering unique insights into the enhancement of governance mechanisms and the question of whether states party are entitled to expect NGOs to demonstrate fidelity to the object and purpose of treaty instruments in international law.

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<sup>43</sup> Charnovitz, 'Two Centuries', above n 30; Mishra, above n 18; Willetts, 'The Cardoso Report', above n 15; BK Woodward, 'Global Civil Society and International Law in Global Governance: Some Contemporary Issues' (2006) 8 *International Community Law Review* 247; Eric Suy, 'New Players in International Relations' in Kreijen et al (eds), *State, Sovereignty, and International Governance* (Oxford University Press, 2002) 373; Thomas G Weiss, and Leon Gordenker, *NGOs, the UN, & Global Governance* (Lynne Rienner, 1996); Peter Willetts, *Non-Governmental Organizations in World Politics. The Construction of Global Governance* (Routledge, 2010).

## 1.4 Method and Methodology

Research conducted for this thesis adopted a mixed methods approach combining traditional legal doctrinal analysis and empirical research. Doctrinal analysis relied on the *Vienna Convention on the Law of Treaties* (hereinafter the *Vienna Convention*). The empirical work involved close documentary analysis of meeting transcripts, survey instruments (questionnaires), and semi-structured interviews with CAMLR Commission and Whaling Commission meeting delegates. Documentary analysis relied on keyword recognition and categorisation by keyword. Survey instruments and semi-structured interviews aimed to determine the subjective evaluation of NGO contributions to the work of both Commission, from NGO and state perspectives. They were also used to explore undocumented NGO behaviours within the Commissions, and to obtain a general picture of the engagement of NGOs and their representatives outside of official documentation.

### Research questions

In this research, the following questions will be answered:

1. What is the content of the object and purpose of the *Whaling Convention and CAMLR Convention*? This question is addressed in Chapters 2 and 3.
2. What are the legal obligations imposed by the CAMLR Commission and Whaling Commission in respect of NGO participation, as understood by reference to the object and purpose? This question is addressed in Chapter 3 and 4.
3. What does current international law scholarship suggest are the preconditions and limits to NGO participation in international bodies? This question is addressed in Chapter 4.
4. How do NGO behaviours reflect an understanding of, or concern for the object and purpose? This question is addressed in Chapters 5, 6, and 7.
5. What is current accepted practice relating to NGO participation in the Commissions, and to what extent does accepted practice reflect formal obligations with reference to the object and purpose? This question is addressed in Chapters 5, 6, and 7.

6. Should NGOs adhere to object and purpose considerations? This question is addressed in Chapter 8.
7. What are the gaps in procedural rules, and what reforms are needed to ensure that NGO behaviour promotes compliance with and support for the underlying object and purpose, and thereby promote effective state action? This question is addressed in Chapter 8.

### Case study approach

The case study approach was chosen to provide depth of analysis, as case studies focus ‘intensively on individual cases to draw insights about causal relationships in a broader population of cases.’<sup>44</sup> There are two levels to the case study approach here. The first investigates the general characteristics of the CAMLR and Whaling Commissions. The Commissions possess characteristics that provide insights into other international institutions, particularly RFBs. The second level investigates the Commissions themselves. There are ‘within case’ case studies in the comparisons of enforcement approaches, MPA decision-making and catch allocation. These are relevant to other RFBs and to other international institutions, as well as in making comparisons between these two Commissions.

### Legal doctrinal analysis and interpretation: theory

The methodology employed for engaging with treaties, Commission documents and other legal documents was a doctrinal analysis of the object and purpose of the *Whaling Convention* and the *CAMLR Convention*. This doctrinal analysis is grounded in the *Vienna Convention*. The legal analysis framework incorporates the elements of conservation, use and common concern, articulated in both conventions and present in other significant documents in international environmental law.<sup>45</sup> A fundamental assumption

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<sup>44</sup> Amy R Poteete, Marco A Janssen and Elinor Ostrom, *Working Together* (Princeton University Press, 2010) 33.

<sup>45</sup> *United Nations Convention on the Law of the Sea*, opened for signature UNTS (entered into force) Part VII, Section 2, articles 116-119; World Commission on Environment and Development, *Our Common Future*, Report of the World Commission on Environment and Development, UNGAOR, 42<sup>nd</sup> sess, Provisional Agenda Item 83(e) UN Doc A/42/427 (4 August 1987) Annex (*‘Our Common Future’*); United Nations General Assembly, *The future we want*, GA Res 66/288, UNGAOR, 6<sup>th</sup> session, 123<sup>rd</sup> mtg, Agenda Item 19, UN

of this thesis is that the object and purpose is integral to the effective decision-making of the Commissions that administer conventions and associated documents. This aligns the object and purpose analysis framework as a form of doctrinal legal analysis, as it relies on accepted forms of treaty interpretation and established international treaties.

Legal doctrinal construction is the foundation for interpretation of the *CAMLR Convention* and the *Whaling Convention*, and construction of the object and purpose in each convention. International law was analyzed, interpreted and constructed from a positivist perspective.<sup>46</sup> Construction of the two conventions' objects and purposes relied on reconciling possible conflicts between core principles of the objects and purposes. 'Use' and 'conservation' can be seen as conflicting, for example. Instead of seeing these as conflicting principles, construction relied on the interdependence of object and purpose principles. Decision-making in the two Commissions gives practical effect to the symbiotic principles of 'use' and 'conservation'. This concept of interdependency was suggested by the oppositional character of the words 'use' and 'conservation' in conjunction with the interpretive expectations of the *Vienna Convention*. A holistic interpretation of the treaties is required in order to reconcile the tensions between these competing concepts.

A criticism of legal doctrinal analysis and interpretation is that it cannot 'fill a gap' in an area of scholarship and that it lacks empirical foundations.<sup>47</sup> It is important to stress that issues of enforceability in international law and its dependence on state will and good faith creates a gap that must be filled, by repeated insistence on the legal obligations of international actors. These obligations must be determined by traditional

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Doc A/RES/66/288 (11 September 2012) [I] referring to 'sustainable development ...environmentally sustainable future for our planet and for present and future generations'.

<sup>46</sup> Jean d'Aspremont, 'Non-state actors from the perspective of legal positivism. The communitarian semantics for the secondary rules of international law' in Jean d'Aspremont (ed), *Participants in the International Legal System. Multiple perspectives on non-state actors in international law* (Routledge, 2011) 23; Andria Naudé Fourie, 'Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research' (2015) 3 *Erasmus Law Review* 95; Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 *Legal Education Review* 177, 178.

<sup>47</sup> Roux, above n 46, 181-182, 186.

methods of legal interpretation. For this reason, this thesis relies on a positivist understanding of international law,<sup>48</sup> and rejects the validity of criticism of legal doctrinal analysis in this context.

Criticism of the absence of empirical foundations in legal doctrinal work can be set aside by considering that legal doctrinal interpretation relates to normative obligations and concepts. The interpretations and constructions put forward here are normative, insofar as law is normative. Nonetheless, the criticism of legal doctrinal work forces the question of whether there is value in legal doctrinal interpretation of treaties and legal doctrinal analysis of NGOs at all. As noted, there is significant non-legal analysis of NGO behaviours in international law. These theoretical models for discussing issues of accountability and legitimacy are applied to empirical research. Here, the interpretation of the two conventions and construction of their objects and purposes is the theory through which empirical research is evaluated. This demonstrates the value of legal doctrinal analysis in generating empirical evidence.

#### [Documentary analysis: empirical research](#)

Documentary analysis involved accessing primary and secondary resources. Some of the primary resources were publicly available. Other sources were not. This includes historical archives of NGO Opening Statements to the Whaling Commission, and documents circulated by NGOs at CAMLR Commission and Whaling Commission meetings in 2011, 2013, 2014, 2016 and 2017. Access to the meeting-based primary materials was through attendance at the CAMLR Commission meetings in 2011, 2013, 2014, and 2017, and at the Whaling Commission meetings in 2014 and 2016. Access to historical archives of NGO Opening Statements was through the Whaling Commission Secretariat, with the help of staff Julie Hunt and Stella Duff in tracking down and providing these in electronic form.

Qualitative data was gathered from two key sources: anonymous questionnaires administered to member state delegates and NGO delegates, and from a series of semi-

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<sup>48</sup> d'Aspremont, above n 46.

structured interviews<sup>49</sup> with NGO participants, state representatives, and Secretariat staff at the CAMLR Commission and Whaling Commission participating. The interviews can be described as qualitative stakeholder interview research design. Questions were exploratory and an informal structure was adopted to take advantage of the individual's knowledge, skill sets, and position in the organization.

The animus of the interviews was curiosity about interviewees' understanding and knowledge of NGO engagement with the Commissions. This sits within the broader scholarship on qualitative interviews, that focuses on determining 'the intentions and perspectives of those involved in social interactions.'<sup>50</sup> The interviews explored actors' knowledge of the history of the organizations not apparent from annual meeting reports, as well as their own attitudes toward the value of NGO activities, perceptions of state responsiveness, and knowledge of otherwise undocumented NGO influences on and engagement around Commission agenda items.

The structured components of the interviews used questions that aimed at gauging the nature of interviewee involvement with NGOs and the Commission, and their depth of knowledge, engagement and experience with NGOs and the Commissions. Generally, there were two aspects beyond this that were then explored. The first was establishing the interviewee's view of the importance or value of NGOs in engaging with the Commissions. The second was engaging interviewees to determine whether questioning them about their perspective on legal obligations and regulation would be valuable. There were only three interviewees that demonstrated knowledge of the legal frameworks of the Commissions.<sup>51</sup>

The interviews with NGO representatives began with a series of structured questions.<sup>52</sup> These questions aimed to determine the length of Commission engagement of the NGO

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<sup>49</sup> University of Tasmania Ethics Reference No: H0014221: Role of nongovernment organizations in the International Whaling Commission and the Commission for the Conservation of Antarctic Marine Living Resources.

<sup>50</sup> Jane Agee, 'Developing qualitative research questions: a reflective process' (2009) 22(4) *International Journal of Qualitative Studies in Education* 431, 432.

<sup>51</sup> Interviewee 2 (16 September 2014); Interviewee 9 (17 September 2014); Interviewee 11 (2 November 2015).

<sup>52</sup> See Appendix 3.

and of the representative. Other aspects of the interview focused on establishing whether the organization had engaged with specific or broad issues, such as animal welfare, environmental protection, scientific research, encouraging industry engagement, or cultural representation. Some questions probed into organizational agendas, general value of the organization's contributions to the Commission, the organization's influence in Commission decisions or state policy positions, and specific examples of such influence. These questions were designed to understand the identity and position of each NGO within the Commission with which it engaged, and to determine if there was more to NGO engagement than was reflected in meeting records.

Questionnaires were aimed at gathering quantifiable data of delegate views on NGO engagement, both generally and on the issue of marine reserves. Questionnaires were distributed to member state delegates at the 2016 CAMLR Commission and Whaling Commission meetings. The questionnaires contained several questions seeking views on NGO engagement on the issue of marine protected areas and sanctuaries. Both were key agenda items at the 2016 plenary meetings. General views were also sought, in categories relating to usefulness of NGOs, as well as categories of NGO activity. See Appendices 1 and 2 for these questionnaires.

For the 2016 questionnaires approximately a third of the member states for each Commission submitted a completed questionnaire. For the Whaling Commission this was 40 member states, for the CAMLR Commission, eight member states. This low response rate in the CAMLR Commission is attributable to the author's absence due to attendance at the Whaling Commission meeting, and at the Whaling Commission meeting to the sheer size of the meeting itself. Language barriers were also an issue, as both Commissions work in multiple languages and questionnaires could only be administered in English, due to a lack of funding and linguistic capability.

### Limitations

A limitation in administering interviews and questionnaires was the language barrier (the author only speaks English). It was possible to interview several Spanish speakers in English, however there were barriers to accessing many Russian speakers and French speakers. The working languages of the Whaling Commission and the CAMLR Commission are:

CAMLR Commission <sup>53</sup>	Whaling Commission <sup>54</sup>
English	English
French	French
Russian	Spanish
Spanish	

*Table 1.1 Working languages of the CAMLR Commission and Whaling Commission*

Both Commissions use simultaneous translation during meetings. In the CAMLR Commission, this means that English, French, Russian and Spanish interpreters work during the meeting times to provide live interpretation of discussions. In the Whaling Commission this is restricted to English, French and Spanish. The same simultaneous interpretation is provided, allowing attendees at the meeting to follow all comments from all delegates in their preferred language. To this extent, there was no language limitation during meeting observations.

## 1.5 Thesis structure

The thesis proceeds in 8 chapters. Chapters Two, Three and Four provide the analysis framework for discussion of whether NGO behaviours are guided by object and purpose principles. Chapters Two and Three engage with the research question of ‘what is the content of the object and purpose of the *CAMLR Convention* and *Whaling Convention*? Chapter Two begins with a discussion of the rules of construction of the object and purpose, and interpretation of international treaties. Chapter Three applies these rules to the *Whaling Convention* and the *CAMLR Convention* to provide a clear explanation of the fundamental object and purpose principles of each convention, and the mandate of each Commission under its convention. Chapters Three and Four explore the research question of what legal obligations are imposed by the two Conventions in respect of NGO participation, as understood by reference to the object and purpose. Chapter Four also engages with what current international law scholarship suggests are the preconditions and limits to NGO participation in international bodies. It refines the

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<sup>53</sup> *CAMLR Commission Rules of Procedure*, Part VIII, Rule 37 Languages.

<sup>54</sup> *Whaling Commission Rules of Procedure*, Rule N Languages of the Commission.



concept of NGO to ensure specificity in the broad field of 'civil society' interaction with IGOs.

Chapters Five, Six and Seven explore two research questions. These chapters explore how NGO behaviours reflect an understanding of, or concern for the object and purpose of the Conventions. They also explore what current accepted practice relating to NGO participation is and the extent to which accepted practice reflects formal obligations with reference to the object and purpose. These chapters apply an object and purpose-based analysis framework to historical behaviours of NGOs (Chapter Five), to marine reserves (Chapter Six), and catch regulation and enforcement (Chapter Seven). These chapters evaluate whether NGOs act in accordance with object and purpose principles. After this exploration of the question of NGO actions, Chapter Eight asks whether object and purpose principles should guide NGO behaviour in relation to that treaty, and if so, how that should be done. Chapter Eight considers the possibility of reform to *Rules of Procedure* and Secretariat practice. It considers what gaps exist in procedural rules, and what reforms are needed to ensure that NGO behaviour promotes compliance with and support for the underlying object and purpose, and thereby promote effective state action.

**Chapter Two** explains the interpretation of treaties and construction of the object and purpose in international law. It clarifies what is meant by object and purpose, explores why the object and purpose is important to both state and non-state actors, and proposes an approach to its construction that strictly adheres to the *Vienna Convention on the Law of Treaties* rules. The construction of the object and purpose of each convention is explored in relation to the *Vienna Convention*. This chapter demonstrates the fundamental soundness of the doctrinal analysis under the *Vienna Convention* in then developing the object and purpose analysis framework employed from Chapters Three onward.

**Chapter Three** interprets the *Whaling Convention* and the *CAMLR Convention* according to the *Vienna Convention*. The contents of the conventions are discussed using an object and purpose analysis. The historical context of the two conventions is discussed, in order to address the relevant historical factors that influenced drafting and thus interpretation. In interpreting the Conventions, this chapter engages with the respective

jurisdiction of each Commission. Also discussed are the influence of the Conventions' subject matter and jurisdiction on the operation of the Commissions.

**Chapter Four** engages with the NGO as a type of non-state actor. This chapter explores the literature on what constitutes an NGO and defines NGOs according to their unique set of characteristics. This chapter also explores the observer role allowed to NGOs in the CAMLR Commission and Whaling Commission through an object and purpose lens. This part of the chapter looks at the Conventions, as well as *Rules of Procedure* and *Rules of Debate* to understand the nature of NGO positions, independent of state delegations, in the Commissions.

**Chapter Five** provides an analysis of NGO attendance applications and engagement across the life of each Commission. This chapter highlights object and purpose consideration and the influence of Commission behaviour on NGO behaviours. This discussion of context demonstrates that there are correlations between Commission expectations on NGOs and NGO regard for object and purpose. In relation to the rules and practice surrounding NGO engagement, analysis was conducted of the initial expectations placed on NGOs in their applications for admission as observers at Commission meetings. This analysis demonstrates that a Commission insisting on NGO support for object and purpose principles encourages continued consideration of these principles later in NGO engagement, particularly where NGOs are reminded of these expectations.

**Chapter Six** engages in an in-depth analysis around catch regulation and enforcement, looking at illegal, unreported and unregulated (IUU) fishing of Patagonian toothfish (*Dissostichus eleginoides*) and Japanese scientific whaling in the Southern Ocean. This chapter looks at two contexts of NGO behaviours: The first is the forum of meeting spaces, focusing on accredited meeting observer NGOs and non-accredited NGOs acting as protesters. Meeting observers are also evaluated in terms of their adherence to convention-based definitions of the roles of NGOs, through an object and purpose framework. The second is intersessional conduct of accredited and non-accredited NGOs, particularly in relation to attempted enforcement of perceived breaches of international law under the jurisdiction of the Commissions. This chapter demonstrates that NGO behaviours on these two issues were largely considerate of object and

purpose principles and the cooperative nature of their role, sometimes despite the intentions of NGOs themselves.

**Chapter Seven** provides an in-depth analysis of NGO behaviours as accredited meeting observers on the issues of marine sanctuaries and marine protected areas. An argument is introduced, based on survey data, that the subjective evaluations of states and other stakeholders in the Commission need an objective reference point for evaluation of NGO behaviours. This reference point is the object and purpose. The object and purpose analysis in this chapter demonstrates that environmental NGO behaviours in relation to protected areas is frequently lacking in sufficient engagement with object and purpose principles and acting outside a supportive role. The International Union for the Conservation of Nature (IUCN) has demonstrated deferral to the Commissions, and a clearly supportive role, as has the scientific NGO, the Scientific Committee for Antarctic Research (SCAR). Industry NGOs in both Commissions had minimal engagement with the issue of protected areas but demonstrated clear engagement with the object and purpose principles, and their subordinate roles as observers. The findings in this chapter lead into the recommendations contained in Chapter Eight.

**Chapter Eight** provides an overview of the findings of the preceding three chapters. It then concludes that NGOs should be expected to adhere to the object and purpose principles of conventions. It presents several recommendations for amendments to the *Rules of Procedure* and *Rules of Debate* in the Commissions to enhance NGO engagement with the object and purpose. However, the majority of these recommendations focus on the Whaling Commission. These recommendations are intended to make clear the subordinate, cooperative roles of NGOs under the conventions, and to clarify an expectation of NGOs contributing to the work of the Commission in light of the object and purpose principles. Recommendations on the admissions process for observers stress the importance of the capacity of NGOs to contribute in the consideration of their admission as observers. This chapter concludes that within the broader context of NGO contributions in international law, there is room to clarify rules and processes to maximize the effectiveness of NGO contributions to intergovernmental organizations.

## Chapter 2 Object and purpose: interpretation and substantive obligations

### 2.1 Introduction

This thesis investigates whether the object and purpose of an international agreement guides or limits NGO engagement with the CAMLR Commission and Whaling Commission, both formally and informally. This is done through the application of an object and purpose analysis framework. To develop the necessary investigative tools, this chapter clarifies what is meant by object and purpose, explores why the object and purpose is important to both state and non-state actors, and proposes an approach to the construction of the object and purpose that adheres to the *Vienna Convention on the Law of Treaties*.

The chapter then constructs the object and purpose of the *Whaling and CAMLR Conventions*, by reference to convention text, structure, and the sources of the object and purpose in each Convention as found in their negotiating history. This chapter concludes that a construction of the object and purpose of the two Conventions as consisting of mutually supportive rather than competing elements is the best application of those elements.

### 2.2 The definition and role of a Convention's object and purpose

#### 2.2.1 What is the object and purpose and what is its role?

The object and purpose of a treaty is a 'single overarching notion'<sup>55</sup> that indicates the fundamental logic, essence<sup>56</sup> or reasons behind a treaty.<sup>57</sup> The International Court of

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<sup>55</sup> Jan Klabbbers, Oxford Public International Law, *Max Planck Encyclopedia of Public International Law* (at December 2006) 'Treaties, Object and Purpose' [6]; Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 193-194.

<sup>56</sup> Jonas and Saunders, above n 41, 567 citing Buffard, Isabelle and Zemanek, Karl, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 *Austrian Review of International and European Law* 311, 343.

Justice (ICJ) first used the term ‘object and purpose’ in 1951 in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*.<sup>58</sup> The current wording ‘object and purpose’ can be regarded as a progression from the idea of the spirit of a treaty.<sup>59</sup> It has become a key aspect of treaty interpretation through Article 31 of the *Vienna Convention on the Law of Treaties*<sup>60</sup> (*Vienna Convention*). A treaty’s object and purpose is recognised as an essential reference point for interpretation of international treaties. It is central to many judicial decisions in international appellate bodies, tribunals and the ICJ, all of which use the *Vienna Convention* Article 31, and so rely on the object and purpose as a means of treaty interpretation.<sup>61</sup>

Treaty interpretation with the object and purpose is not without complication. David Jonas and Thomas Saunders refer to the *concept* of object and purpose as abstract, stating that we can simply define it broadly, as ‘a treaty’s goals’ but that giving the concept more definition would detract from its importance.<sup>62</sup> Jan Klabbbers notes that the specific object and purpose of a treaty cannot be defined in the abstract.<sup>63</sup> The construction of object and purpose must be contextual, resulting in a connection between construction of the object and purpose and its application to facts and specific treaty provisions.<sup>64</sup> So, while a broad construction of the object and purpose is possible,

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<sup>57</sup> Ulf Linderfalk, ‘On the Meaning of the ‘Object and Purpose’ Criterion, in the Context of the *Vienna Convention* on the Law of Treaties, Article 19’ (2003) 72 *Nordic Journal of International Law* 429, 434; Klabbbers, above n 55 [11].

<sup>58</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Reports 15.

<sup>59</sup> Klabbbers, above n 55 [1].

<sup>60</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (hereinafter ‘*Vienna Convention*’).

<sup>61</sup> Malgosia Fitzmaurice, Elias Olufemi and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, 2010); Sands and Commission, above n 37, 39; Gardiner, above n 55, 198-202; Hulme, above n 39, 1303-1329.

<sup>62</sup> Jonas and Saunders, above n 41, 571.

<sup>63</sup> Klabbbers, above n 55 [6].

<sup>64</sup> Klabbbers, above n 55 [6]; Sands and Commission, above n 37, 58.

for each exercise of a treaty body's jurisdiction, the treaty's object and purpose depends on what the treaty wording is, the circumstances in which the object and purpose is to be understood, and the particular Article or obligation to be interpreted and applied.<sup>65</sup>

The object and purpose is also indivisible – it is to be read as a whole concept from the context within which it is defined.<sup>66</sup> This means that multiple principles may need to be considered in construction and application of the object and purpose. This indivisibility counters criticisms of the object and purpose as too ambiguous, flexible, and manipulable.<sup>67</sup> Retaining flexibility in treaty interpretation can ensure the best interpretation available to a court or tribunal,<sup>68</sup> but flexibility and ambiguity are two different things. The many-headed nature of the object and purpose militates against ambiguity as each mutually supportive principle creates a boundary by which to define the object and purpose. If the object and purpose could be separated into multiple, unconnected principles there would be ambiguity and manipulability because any one or more principles, as derived from the treaty text could be excluded. As an indivisible concept both in the abstract and in context, the object and purpose is flexible in application but sufficiently definite in construction to serve both the need for broad application, and for sufficient certainty.<sup>69</sup>

The object and purpose can have both substantive and methodological functions. It can be used as an 'independent substantive element' of a treaty, against which the legality of state behaviours can be measured.<sup>70</sup> This is important to the object and purpose analysis framework proposed in Chapter Three. In most instances, the object and

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<sup>65</sup> Klabbers, above n 55 [7] and [11] citing Special Rapporteur of the UN ILC A Pellet, Pellet, Alain, Special Rapporteur, *Tenth Report on reservations to treaties, addendum*, International Law Commission, 57<sup>th</sup> sess, UN Doc A/CN.4/558/Add.1 (14 June 2005) ('*Tenth Report*'); Gardiner, above n 55, 194.

<sup>66</sup> Gardiner, above n 55, 192, 194-201.

<sup>67</sup> Jonas and Saunders, above n 41, 569; Klabbers, above n 55 [22] citing Pellet, *Tenth Report* 57<sup>th</sup> sess, UN Doc A/CN.4/558/Add.1 (14 June 2005); Sir Humphrey Waldock, (Special Rapporteur), *Third Report on the law of treaties*, UN Doc A/CN.4/167 and Add.1-3; Extract from the *Yearbook of the International Law Commission* 1964, Vol II, 53.

<sup>68</sup> Hulme, above n 39, 1284.

<sup>69</sup> Klabbers, above n 55 [8]; Gardiner, above n 55, 200-201.

<sup>70</sup> Klabbers, above n 55 [3]; Hulme, above n 39, 1288-1289.

purpose is central to the methodological approach of treaty interpretation; its construction is an aid to ensure that the textual reading of a treaty<sup>71</sup> is made in light of the object and purpose.<sup>72</sup> Whether the object and purpose of a treaty is used as a substantive legal assessment tool or as part of the process of interpretation, judiciaries, tribunals, governments and others require the definition to have sufficient certainty in order to apply it to policy, to legal disputes. Definition is also required so that states, which may later accede to or succeed to the treaty, know the purpose of the treaty to which they are becoming party.<sup>73</sup>

### 2.2.2 Articles 31 and 32 of the *Vienna Convention* – significance of the object and purpose to treaty interpretation

The primary interpretative document for treaties is the 1969 *Vienna Convention on the Law of Treaties* (the *Vienna Convention*), which is considered customary international law<sup>74</sup> and therefore applies to the *CAMLR Convention*, the *Whaling Convention* and to the *Schedule to the Whaling Convention*.<sup>75</sup> The ICJ has relied upon it in interpreting the *Whaling Convention*,<sup>76</sup> and it is a reference point for interpretation in both Whaling and CAMLR Commission plenary meetings.<sup>77</sup> The key Articles of the *Vienna Convention* of

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<sup>71</sup> *Vienna Convention*, Article 31; Jonas and Saunders, above n 41; Stephen Hall, *Principles of International Law* (LexisNexis, 4<sup>th</sup> ed, 2014) 105.

<sup>72</sup> *Vienna Convention*, Article 31(1).

<sup>73</sup> Hulme, above n 39, 1288.

<sup>74</sup> Gardiner, above n 55, 12-13; Hulme, above n 39, 1282.

<sup>75</sup> *Vienna Convention*, Article 4.

<sup>76</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Reports 226 ('Whaling in the Antarctic').

<sup>77</sup> *IWC 53<sup>rd</sup> Annual Meeting of July 2001*, 'Annual Report of the International Whaling Commission 2001 – covering the 2000-2001 financial year (53<sup>rd</sup>)' (London, United Kingdom, adopted July 2001) 2-3, and *Resolution on Transparency within the International Whaling Commission*, Resolution 2001-1, IWC/53/23Rev; *IWC 55<sup>th</sup> Annual Meeting of June 2003*, 'Annual Report of the International Whaling Commission 2003 – covering the 55<sup>th</sup> 2002-2003 financial year' (Berlin, Germany, adopted June 2003) 27; *IWC 58<sup>th</sup> Meeting of June 2006*, 'Annual Report of the International Whaling Commission 2006 – covering the 2005-2006 financial year' (St Kitts and Nevis, West Indies, adopted June 2006) 7; *CCAMLR-XIV Meeting of 24 October – 3 November 1995*, 'Report of the Fourteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November 1995)

relevance to construction of the object and purpose are Articles 19, 31 and 32. Article 31 provides that:

*Article 31, GENERAL RULE OF INTERPRETATION*

*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

*2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

*(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*

*(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

*3. There shall be taken into account, together with the context:*

*(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

*(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

*(c) Any relevant rules of international law applicable in the relations between the parties.*

*4. A special meaning shall be given to a term if it is established that the parties so intended.*

Article 31 presents a nuanced approach to interpretation that requires a textual, objective reading, which then requires object and purpose-oriented (teleological) and

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71; CCAMLR-XIX Meeting of 23 October – 3 November, 2000, 'Report of the Nineteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November, 2000) 64; CCAMLR-XXVII Meeting of 27 October – 7 November 2008, 'Report of the Twenty-Seventh Meeting of the Commission' (Hobart, Australia, adopted 7 November 2008) 68; CCAMLR-XXVIII Meeting of 26 October – 6 November 2009, 'Report of the Twenty-Eight Meeting of the Commission' (Hobart, Australia, adopted 6 November 2009) 52; CCAMLR-XXXIV Meeting of 19-30 October 2015, 'Report of the Thirty-Fourth Meeting of the Commission' (Hobart, Australia, adopted 30 October 2015) 163.



intention-based (subjective) approaches to provide a comprehensive interpretation of a treaty. Article 31(1) provides that a treaty is to be interpreted ‘with the ordinary meaning to be given to the terms of the treaty’. This is the initial objective, or textual approach to treaty interpretation. This considers the text as the primary source of treaty interpretation and construction of the object and purpose.<sup>78</sup>

Article 31(1) then states that the textual, objective interpretation of treaty provisions must be ‘in their context and in light of the object and purpose’. This combines the textual, objective approach with a teleological, or purpose-based, element.<sup>79</sup> The teleological approach considers the object and purpose a fundamental interpretive tool.<sup>80</sup> But wait, there’s more! Article 31(2) incorporates subjective aspects of interpretation. A key source of interpretation is the intentions of the states party at the conclusion of the treaty. The subjective approach to interpretation is also present through the inclusion of instruments and agreements made by all parties at the time of the conclusion of the treaty as relevant to interpretation.<sup>81</sup>

The balance between the three methods – objective, subjective and teleological – is clear in Article 31 as well as Article 32. These Articles refer to consideration of treaty text, and the treaty preamble as central to construction. Annexes,<sup>82</sup> agreements<sup>83</sup> and practices<sup>84</sup> are also significant. Article 32 refers to contextual understanding of the

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<sup>78</sup> *Vienna Convention*, Article 31(1); Waldock, above n 67, 54, [8]; Jonas and Saunders, above n 44, 578; Gardiner, above n 55, Ch 5; Hall, above n 71; contra see Hulme, above n 39, 1285.

<sup>79</sup> Jonas and Saunders, above n 41, 578; Gardiner, above n 55, Ch 5; Hall, above n 71; contra, see Hulme, above n 39, 1285.

<sup>80</sup> Jonas and Saunders, above n 41; Gardiner, above n 545 189; Shaw, Malcolm N, *International Law* (Cambridge University Press, 7<sup>th</sup> ed, 2014) 676; Hall, above n 73, 105; Waldock, above n 67, 54, [7].

<sup>81</sup> *Vienna Convention*, Article 31(1); Jonas and Saunders, above n 41, 578; Gardiner, above n 55, Chapter 5.

<sup>82</sup> *Vienna Convention*, Article 31(2).

<sup>83</sup> *Vienna Convention*, Article 31(2)(a)(b), 31(3)(a)(b).

<sup>84</sup> *Vienna Convention*, Article 31(3)(b).

parties' intentions with reference to the circumstances of the treaty's conclusion,<sup>85</sup> and to the *travaux préparatoires*.<sup>86</sup>

Article 31(3)(c) also requires that interpretation take into account relevant rules of international law applicable in the relations between parties in establishing context.<sup>87</sup> For example, legal principles affecting regional fisheries include the duty to cooperate,<sup>88</sup> the duty on regional fishery bodies (RFBs) to take primary responsibility for high seas marine living resource management<sup>89</sup> and other principles of marine environmental conservation arising from the *United Nations Law of the Sea Convention*.<sup>90</sup>

There are also soft law instruments focussing on managing common or global environmental concerns, a recurrent focus in international law,<sup>91</sup> beginning with the 1972 *Stockholm Declaration*.<sup>92</sup> While these soft law instruments are not binding, they are useful context for interpretation as subsequent practice, particularly in light of the

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<sup>85</sup> *Vienna Convention*, Article 32.

<sup>86</sup> *Vienna Convention*, Article 32.

<sup>87</sup> *Vienna Convention*, Article 31(3)(c); Gardiner, above n 55, 250-251.

<sup>88</sup> Elise Anne Clark, 'Strengthening Regional Fisheries Management – An Analysis of the Duty to Cooperate' (2011) 9 *New Zealand Journal of Public International Law* 223; Gardiner, above n 55, 268-269 citing *The Iron Rhine (Ijzeren Rijn) Railway (Belgium v Netherlands)* (Award) (2005) RIAA 35-125.

<sup>89</sup> *Law of the Sea Convention*, opened for signature 10 December 1982, 1883 UNTS 3 (entered into force 16 November 1994) Article 197 ('*Law of the Sea Convention*').

<sup>90</sup> *Ibid* Articles 64, 65, 87, 88, 116-120 and Part XII.

<sup>91</sup> *Declaration of the United Nations Conference on the Human Environment* UN Doc A/Conf.48/14/Rev 1 (1973) ('*Stockholm Declaration*'); *Rio Declaration on Environment and Development* UN Doc A/CONF.151/26 (vol 1) (1992) ('*Rio Declaration*'); *Johannesburg Declaration on Sustainable Development* A/CONF.199/20 (2002) ('*Johannesburg Declaration*'); Gro Harlem Brundtland, *Report of the World Commission of Environment and Development: Our Common Future*, 42<sup>nd</sup> session, Agenda item 83(e) of the provisional agenda, UN Doc A/42/427 (4 August 1987) Annex ('*Our Common Future*').

<sup>92</sup> *Stockholm Declaration* UN Doc A/Conf.48/14/Rev 1 (1973).

temporal aspect of interpretation, requiring interpretation to be made in light of contemporary norms and not those at the time of the conclusion of the treaty.<sup>93</sup>

While a hierarchy exists between Articles 31 and 32 of the *Vienna Convention*,<sup>94</sup> Rahim Moloo argues that within Article 31 there is no hierarchy, and that subsequent practice is of equal footing to the text in interpreting the meaning of a treaty. This understanding of Article 31 is supported by the International Law Commission (ILC).<sup>95</sup> Context, subsequent practice, and subsequent agreements are as significant to interpreting treaty text as the text itself, as these reflect the interpretation of the treaty by parties to it, and provide special meaning or depth of meaning to terms and provisions that may, on the face of the text, have a different meaning.

For construction of the object and purpose, and treaty interpretation generally, Article 32 is only of use where interpretation under Article 31 leaves the meaning of a treaty provision or text ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.<sup>96</sup> Thus, the materials listed at Articles 31(2) and (3) have more interpretative value than the preparatory materials in section 32.<sup>97</sup> The primary reference point for treaty interpretation is Article 31, which engages textual, teleological and contextual means of interpretation. The object and purpose under Article 31 is a key aspect of treaty interpretation, and a clear understanding of its fundamental principles, or aspects, is necessary to treaty interpretation and the work of international treaty bodies.

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<sup>93</sup> Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26(1) *The European Journal of International Law* 169, 169-170.

<sup>94</sup> Rahim Moloo, 'When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation' (2013) 31(1) *Berkeley Journal of International Law* 39, 43.

<sup>95</sup> *Ibid*; 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 *Yearbook of the International Law Commission* 187, 219-20.

<sup>96</sup> *Vienna Convention*, Article 32 (a) and (b).

<sup>97</sup> Hulme, above n 39, 1298.

### 2.2.3 Construction of the object and purpose

The *Vienna Convention* contains no specific rules for divining the object and purpose of a treaty. However, it has been accepted that Article 31 of the *Vienna Convention* is the reference point for the construction of the object and purpose, depending upon the text of a treaty and its context.<sup>98</sup> This entails a two-step process: consideration of the text of the treaty, followed by consideration of the context listed at Article 31(2) and (3). Construction of the object and purpose is subject to the same interpretative rules as those for treaty obligations, under Articles 31 and 32 of the *Vienna Convention*. The *Vienna Convention* is silent on the source of the object and purpose,<sup>99</sup> but it has been accepted that the matters listed for elucidation of context can also apply to the construction of object and purpose.<sup>100</sup> The Preamble to a treaty is a primary source of the object and purpose,<sup>101</sup> explaining the motivations and objectives behind the treaty.<sup>102</sup>

Commentators have noted that there is a circularity in the argument that the object and purpose can be found in the text of the treaty in order to interpret the text of the treaty.<sup>103</sup> Jonas and Saunders note that this is not a problem when we consider that the object and purpose is a general statement used for the purposes of understanding

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<sup>98</sup> Hulme, above n 39, 1300; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980); Linderfalk, 'Art or Science?', above n 93, 178 citing *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* Judgment, 17 December 2002, ICJ Reports (2002) 625; Klabbers, above n 43 [11] citing Pellet *Tenth Report*, 57<sup>th</sup> sess, UN Doc A/CN.4/558/Add.1 (14 June 2005); Waldock, above n 67, 53.

<sup>99</sup> Hulme, above n 39, 1296.

<sup>100</sup> Hulme, above n 391, 1300; *Vienna Convention*; Linderfalk, 'Art or Science?', above n 93, 178 citing *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* Judgment, 17 December 2002, ICJ Reports (2002) 625; Klabbers, above n 43 [11] citing Pellet *Tenth Report*, 57<sup>th</sup> sess, UN Doc A/CN.4/558/Add.1 (14 June 2005); Waldock, above n 67, 53.

<sup>101</sup> Makane Moïse Mbengue, Oxford Public International Law, *Max Planck Encyclopedia of Public International Law* (at September 2006) 'Preamble' [5] citing *Beagle Channel Arbitration (Argentina v Chile) (Awards)* (1977) 52 ILR 132; Hulme, above n 39, 1287, 1297-1300.

<sup>102</sup> Hulme, above n 39, 1288; Gardiner, above n 55, 186.

<sup>103</sup> Jonas and Saunders, above n 41, 574; Koskeniemi, above n 25, 298.

specific provisions or behaviours.<sup>104</sup> So, while the treaty as a whole is the primary source of definition for the object and purpose, the object and purpose is a general concept for the interpretation of specific obligations in the treaty.

Object and purpose construction is aided by historical and subsequent practices, instruments and agreements of the parties. Historical and subsequent practices have been generally accepted in practice and scholarly commentary as bearing on the object and purpose.<sup>105</sup> Subsequent practices and agreements are of particular interest, as they can indicate how treaty organizations have changed with time and how the approach to treaty obligations may give a special meaning to words in the treaty. Sources of subsequent practice and agreements or instruments depend on one key factor: common practice, agreement or understanding amongst all parties to a treaty.<sup>106</sup> These can impact on principles within the object and purpose, particularly where words have not been defined in the treaty text.

The question of precedent can arise when considering construction of the object and purpose. Where a treaty has been the subject of a dispute in the ICJ the decision of the court applies only to the parties that submitted to its jurisdiction,<sup>107</sup> and decisions of the court or other courts are not considered precedential.<sup>108</sup> However, there is widespread use of previous judicial decision to inform the reasoning of courts.<sup>109</sup> The question of an authoritative or precedential construction of the object and purpose of

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<sup>104</sup> Jonas and Saunders, above n 41, 582.

<sup>105</sup> Linderfalk, 'Art or Science?', above n 93, 178 citing *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* Judgment, 17 December 2002, ICJ Reports (2002) 625; Klabbers, above n 43 citing Pellet, *Tenth Report*, 57<sup>th</sup> sess, UN Doc A/CN.4/558/Add.1 (14 June 2005).

<sup>106</sup> Rodoljub M Etinski, 'Means of Interpretation and their Interrelationship' (2016) 1 *Novi Sad Faculty of Law Serbia Collected Papers* 9, 23 (doi:10.5937/zrpfns50-10844); Waldock, above n 67, 53.

<sup>107</sup> *Statute of the International Court of Justice*, (26 June 1945) 59 Stat 1055 (*ICJ Statute*) Articles 36(1) and 59.

<sup>108</sup> *ICJ Statute*, Articles 38(1)(d) and 59.

<sup>109</sup> Harlan Grant Cohen, 'Chapter 13: Theorizing Precedent in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor, *Interpretation in International Law* (Oxford Scholarship Online, 2015) 269-270.

the *Whaling Convention* arises because of the *Whaling in the Antarctic* case. However, the decision of the ICJ is only authoritative in relation to the parties to the case, in accordance with its own statute, and its decision can only inform later reasoning or decision-making.

Two principles of treaty interpretation that are also useful in considering the construction of the object and purpose are the principles of contemporaneity and effectiveness. The application of these principles is subject to Article 31 of the *Vienna Convention*.<sup>110</sup> The principle of contemporaneity recognises applicable aspects of subsequent practice or agreement, and relevant rules of international law. The principle of effectiveness focuses on ensuring the stability of a treaty through interpretation and definition that carries out the treaty provisions most effectively. Contemporaneity can also be described as the principle of ‘system integration’, recognising the contemporary legal system within which a treaty regime operates.<sup>111</sup>

The principle of contemporaneity recognises that no legal relationship remains unaffected by the passage of time, and that the meaning of treaties can present difficulties if change is not taken into account in interpretation.<sup>112</sup> The principle reflects the need to take into account changes in legal principles and circumstances, recognised between all parties, without undermining the fundamental object and purpose of a treaty, maintaining a balance between stability and change.<sup>113</sup>

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<sup>110</sup> Unless ambiguity brings *Vienna Convention* Article 32 into operation: Moloo, ‘Actions Speak Louder’, above n 94, 43.

<sup>111</sup> Margaret A Young and Sebastian Rioseco Sullivan, ‘Evolution Through the Duty to Cooperate: Implications of the *Whaling Case* at the International Court of Justice’ (2015) 16 *Melbourne Journal of International Law* 1, 12 citing *Fragmentation of International Law* UN Doc A/CN.4/L.702.

<sup>112</sup> Martin Dawidowicz, ‘The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica v. Nicaragua*’ (2011) 24 *Leiden Journal of International Law* 201, 201.

<sup>113</sup> Georg Nolte, *Treaties Over Time in Particular: Subsequent Agreement and Practice*, International Law Commission, 365 [1-2] UN Doc A/63/10 (2008) cited in Rahim Moloo, ‘Changing Times, Changing Obligations? The Interpretation of Treaties over Time (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 261, 262.

The limits of reference for determining the materials that can be used in application of the contemporaneity principle are those listed in Article 31:

*any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*

*any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

*any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

*any relevant rules of international law applicable in the relations between the parties.*

The principle of contemporaneity does not override the intentions of parties to a treaty, but permits the recognition of subsequent practices and agreements that reflect either the specific understanding of the parties to a treaty, or subsequent practices and agreements that incorporate relevant rules of international law.<sup>114</sup> This is particularly important when considering the object and purpose, as later political constructions of the object and purpose still require reference back to consensus decisions of all parties to a treaty to expand the meaning of terms and provisions.

The principle of effectiveness is a means of ensuring treaties have their proper effect, and states cannot ‘narrow down treaty obligations through political manipulation’.<sup>115</sup> The principle of effectiveness requires interpretation of treaty provisions that best carry into effect the object and purpose. This reinforces the significance of the object and purpose and the importance of clearly constructing the object and purpose.

The principle of effectiveness also requires that ‘none of the provisions in the treaty is deprived of meaning’<sup>116</sup> and so construction of the object and purpose requires that no aspect of the object and purpose is rendered meaningless. During the ILC Codification

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<sup>114</sup> Moloo, ‘Changing Times’, above n 113, 263.

<sup>115</sup> Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, 2008) 393, 394.

<sup>116</sup> *Ibid.*

work, Special Rapporteur Waldock formulated the effectiveness rule as ‘to give effect to the plain meaning and the object and purpose of the treaty’, which is reflected in Article 31(1) of the *Vienna Convention*.<sup>117</sup> The text, which includes the object and purpose, is the primary instrument for interpretation, ensuring effectiveness.<sup>118</sup>

#### 2.2.4 The relevance of the object and purpose in assessing non-state and NGO behaviours

Construction of the object and purpose must comprehend all elements of the object and purpose of the treaty. An holistic construction of the object and purpose provides a sound basis for a substantive use of the object and purpose as a measure of legality or propriety of state and NGO behaviour. It is also an interpretive basis from which disputes can begin with common ground. The focus should be on the balance within the object and purpose as to its elements or principles, not a competition between these principles.

Without an holistic construction, the object and purpose can become a selective account of the object and purpose: the construction most favourable to the state putting it forward.<sup>119</sup> The object and purpose, by its nature and its sources, is flexible and open to nuanced application.<sup>120</sup> But constructions that exclude important elements undermine the treaty and its application and can prevent states parties to treaties resolving disputes within the treaty organization itself. Selective accounts of the object and purpose create opposing positions based on political understanding rather than legal understanding.

Without a level of certainty in the construction of the object and purpose, political disputes within a treaty organization continue without reference to the fundamental spirit of the treaty, and without reference to key aspects of the contemporaneity and effectiveness rules, which require consensus agreement and full construction of the

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<sup>117</sup> *Ibid* 397.

<sup>118</sup> *Ibid* 398.

<sup>119</sup> Hulme, above n 39, 1300; Michael Bowman, “‘Normalizing’ the International Convention for the Regulation of Whaling’ (2008) 29(3) *Michigan Journal of International Law* 293, 383.

<sup>120</sup> Jonas and Saunders, above n 41, 569; Klabbers, above n 43 [22] citing Pellet, *Tenth Report*, 57<sup>th</sup> sess, UN Doc A/CN.4/558/Add.1 (14 June 2005).



object and purpose. Without due reference to such rules, states could be said to violate their fundamental obligations under international law,<sup>121</sup> and create conflicts that go against the common understanding of the object and purpose as a unified concept.<sup>122</sup>

The extent to which non-state actors should also be affected by the object and purpose of treaties has not been addressed in any of the literature on NGOs and treaty interpretation. NGOs, while not parties to any international conventions, engage with treaty organizations and states party to treaties. As a matter of logic, it makes little sense to have the primary actor in international law subject to its own agreement, but allow subordinate actors engaging with that agreement, a free hand in the advocacy, information, or action they bring to engagement with a treaty organization, unfettered by consideration of the object and purpose of the treaty. Accordingly, the text of a treaty should be the limit of their abilities in their formal role within a treaty organization, as it is for states. Where legal instruments in a treaty organization create rights of engagement for non-state actors, it is logical to require a parallel set of procedural and substantive responsibilities in exercising those rights. Organizational structures, *Codes of Conduct* and *Rules of Procedure* govern many aspects of NGO behaviours, but consideration of the object and purpose of a treaty can improve and add weight to these structures, codes and rules through ensuring recognition of the legal parameters of the treaty organization.

#### 2.2.5 Summary

This part has offered an approach to the object and purpose as the fundamental logic underlying a treaty. This is significant because the fundamental logic or ‘spirit’ of a

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<sup>121</sup> *United Nations Millennium Declaration*, GA Res 55/2 UN GAOR, Main Comm, 55<sup>th</sup> sess, Agenda Item 60(b), UN Doc A/RES/55/2; *The rule of law at the national and international levels*, GA Res 64/116 UN GAOR, 6<sup>th</sup> Comm, 64<sup>th</sup> sess, Agenda Item 83, UN Doc A/RES/64/116 (16 December 2009); *The rule of law at the national and international levels*, GA Res 66/102 UNGAOR, 6<sup>th</sup> Comm, 66<sup>th</sup> sess, Agenda item 83, UN Doc A/RES/66/102 (6 December 2011); *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, GA Res 67/1 UN GAOR, Main Comm, 67<sup>th</sup> sess, Agenda Item 83, UN Doc A/RES/67/1 (24 September 2012); International Law Commission, *Draft Declaration on Rights and Duties of States with commentaries*, GA Res 375(IV) UN GAOR, 270<sup>th</sup> plenary meeting (6 December 1949) Annex, Article 14.

<sup>122</sup> Klabbers, above n 55 [7].

treaty informs the work of treaty bodies and related organs. This part identified the sources of the object and purpose within the text of the treaty, and outside it, according to the *Vienna Convention*. It further discussed the significance of the object and purpose as a unified concept, in both interpreting treaty text and assessing state and non-state conduct. It highlighted key issues in the construction and application of the object and purpose and demonstrated the parallels between treaty interpretation and object and purpose construction. The next section constructs the object and purpose the *CAMLR Convention* and *Whaling Convention* before examining Articles key to the exercise of each Commission's jurisdiction.

## 2.3 Defining the object and purpose in the *CAMLR Convention* and *Whaling Convention*

### 2.3.1 Introduction to object and purpose of the conventions

A comprehensive construction of the object and purpose can provide a means of interrogating whether non-state actors, particularly NGOs use their position under a treaty to advance the object and purpose. This section constructs the *CAMLR Convention* object and purpose, and the *Whaling Convention* object and purpose, with reference to three primary principles at the core of both conventions: use, conservation, and common concern.

The object and purpose of both conventions is defined using the textual and contextual approaches under Article 31 of the *Vienna Convention*, with particular reference to applicable instruments and agreements existing at the time of drafting of the treaty,<sup>123</sup> subsequent practice,<sup>124</sup> and applicable norms and rules of international law.<sup>125</sup> These constructions take into account the difficulties of giving too much specificity to concepts that rely on context and application for specific meaning.<sup>126</sup>

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<sup>123</sup> *Vienna Convention*, Article 31(2)(a).

<sup>124</sup> *Vienna Convention*, Article 31(3)(b).

<sup>125</sup> *Vienna Convention*, Article 31(3)(c).

<sup>126</sup> Klabbers, above n 55 [7] and [11] citing Pellet *Tenth Report*, 57<sup>th</sup> sess, UN Doc A/CN.4/558/Add.1 (14 June 2005); Gardiner, above n 55, 194.

## Conservation and use

The primacy of use and conservation is clear through Article II of the *CAMLR Convention*, and the preambular text of the *Whaling Convention*. Use, conservation and common concern are the primary elements of the object and purpose clearly articulated as such in the *CAMLR Convention* and the *Whaling Convention*.

Use refers to the extraction of marine living resources – in the Whaling Commission this is species of toothed and baleen whales, in the CAMLR Commission, these are fish, krill, and crab species within the CAMLR Convention Area. In the *CAMLR Convention* ‘use’ is rational use. Article II states that conservation includes rational use. In the *Whaling Convention*, the preambular text and the treaty as a whole makes clear that use is a primary purpose of the convention, supported by conservation, and concern for future generations having access to whaling resources.

Conservation is a word commonly used in international environmental law. Its meaning is presumed to be commonly known, and writers often do not bother to define it. Defining conservation without context among competing stakeholders can lead to conflict about the precise nature of conservation in context, because the contents of the term are reliant on context.<sup>127</sup> The *Oxford English Dictionary (OED)* defines conservation as ‘preservation, protection or restoration of the natural environment and of wildlife’ and ‘the practice of seeking to prevent the wasteful use of a resource in order to ensure its continuing availability.’<sup>128</sup> Firstly the use of the word ‘preservation’ in this definition confuses some of the language in international environmental law. Preservation, as a legal concept has been viewed as antiquated as preservation attempts to freeze ecosystems or resources in perpetuity, without reference to the dynamism of ecosystems and species.<sup>129</sup> However, it also has connotations of future generations’ access to resources.

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<sup>127</sup> Peter J Brosius and Diane Russell, ‘Conservation from Above: Imposing Transboundary Conservation’ (2008) 17(1-2) *Journal of Sustainable Forestry* 39, 42-44.

<sup>128</sup> Oxford English Dictionary (online), *Conservation* n. (e) (November 2010) <http://www.oed.com/view/Entry/39564?redirectedFrom=conservation#eid>.

<sup>129</sup> Anastasia Teletsky, An Cliquet, and Afshin Akhtar-Khavari, *Ecological Restoration in International Environmental Law* (Taylor & Francis, 2016) 21.

A general definition in international environmental law, reflecting the *OED*, and without the complication of preservation is conservation as the ‘saving of natural resources for later consumption’, in terms of both non-consumptive and consumptive use.<sup>130</sup> Definitions of conservation in international environmental law can recognise the complexity of conservation in terms of the array of practices and concepts that inform and define conservation. These include sustainable use, commercial use, rational use, and protecting and preserving resources for future generations.<sup>131</sup> The CAMLR Convention clearly incorporates rational use as an aspect of conservation.<sup>132</sup>

Fundamentally, conservation has to be a goal of a treaty body or system. That body or system must seek to maintain, protect, or rebuild resources for consumptive or non-consumptive values. The context, both legal and practical, will inevitably inform the precise nature of the conservation actions undertaken, and the limits of its application, as well as the meaning of the term ‘conservation’ itself.

#### Common concern

The general recognition of what is considered to be ‘in common’ in academic literature points to both geographical and topical issues affecting a global community.<sup>133</sup> It emphasises a common issue.<sup>134</sup> Common concern can be found in international documents, such as Article 7 of the *Rio Declaration*, as the need ‘to conserve, protect and

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<sup>130</sup> *Ibid* citing John Arthur Passamore, *Man’s Responsibility for Nature* (Duckworth, 1974) 73.

<sup>131</sup> Edward J Goodwin, *International Environmental Law and the Conservation of Coral Reefs* (Routledge, 2011).

<sup>132</sup> *CAMLR Convention*, Article II(1).

<sup>133</sup> Jimena Murillo, ‘Common Concern of Humankind and its Implications in International Environmental Law’ (2008) 5 *Macquarie Journal of International Comparative Environmental Law* 133, 133; Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162(3859) *Science* 1243.

<sup>134</sup> Murillo, above n 133; Daniel Bodansky, Jutta Brunnée and Ellen Hey, *The Oxford Handbook of International Environmental Law* (OUP, 2007) 552; R St John MacDonald and Douglas M Johnston, *The Structure and Process of International Law* (Martinus Nijhoff, 2<sup>nd</sup> ed, 1986); Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (OUP, 2<sup>nd</sup> ed, 2009) 137.

restore the health and integrity of the Earth's ecosystem'.<sup>135</sup> A common concern has been defined as an environmental issue that affects humans as a species, often focussed on the avoidance of irreversible harm and the protection of 'resources of global significance'.<sup>136</sup> Brunnée notes that common concern entitles, 'perhaps even' requires, 'all states to cooperate internationally to address the concern'.<sup>137</sup> This obligation ties closely with the duty to cooperate.<sup>138</sup>

Common concern is recognised as environmental issues that either have a global impact, such as climate change, ozone depletion and biodiversity, or an environmental issue that is a matter of concern for humankind because of the qualities perceived in the geographical area, species or particular issue.<sup>139</sup> There are common concern references in the two conventions. In the *CAMLR Convention* preamble 'it is in the interest of all mankind to preserve the waters surrounding the Antarctic continent for peaceful purposes only'. In the *Whaling Convention* preamble there is 'the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks'. The *CAMLR Convention* common concern covers several aspects of a general definition of common concern, including geographical area, species-based concern, biodiversity and climate change. The *Whaling Convention* falls within the definition as biodiversity and species-based topics of common concern.

### 2.3.2 The object and purpose of the CAMLR Convention

This section constructs the object and purpose of the *CAMLR Convention*. This section covers Article II of the *CAMLR Convention*, the *Antarctic Treaty*, subsequent practice of

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<sup>135</sup> *Rio Declaration*, Principle 7; Bodansky, Brunnée and Hey, above n 134, 564.

<sup>136</sup> Birnie, Boyle and Redgwell, above n 134, 122, 130.

<sup>137</sup> Bodansky, Brunnée and Hey, above n 134, 566.

<sup>138</sup> *Law of the Sea Convention*, Article 118.

<sup>139</sup> Jutta Brunnée 'International Environmental Law: Rising to the Challenge of Common Concern?' (2006) 100 *Proceedings of the Annual Meeting (American Society of International Law)* 307-310, 308; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, Declaration of Judge Bedjaoui [13]; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep 1997, 118; Murillo, above n 134, 133; Hardin, above n 133; Brundtland, above n 91; Birnie, Boyle and Redgwell, above n 134, 119; Sands et al, *Principles of International Environmental Law* (CUP, 3<sup>rd</sup>, 2012) 209.

the CAMLR Commission members in defining common concern, conservation and rational use, and incorporation of the precautionary approach into Article II. This section then locates the *CAMLR Convention* in the context of applicable international law rules, including the duty to cooperate, and primary responsibility of regional fishery bodies (RFBs) for the management of high seas marine living resources.

The *CAMLR Convention* was negotiated by Antarctic Treaty Consultative Parties (ATCPs) pursuant to the *Antarctic Treaty* Article IX conservation mandate.<sup>140</sup> The *CAMLR Convention* object and purpose cannot be defined in isolation from the *Antarctic Treaty* and the Antarctic Treaty System (ATS); they are connected to such a degree that the *CAMLR Convention* can be described as ‘an integral part of the Antarctic Treaty System.’<sup>141</sup> The *CAMLR Convention* recognises the *Antarctic Treaty* numerous times in the Preamble and its substantive parts,<sup>142</sup> and the object and purpose of the *Antarctic Treaty* is ‘in CCAMLR’s genetic make-up’.<sup>143</sup> Common concern for the preservation of the Antarctic for peaceful purposes for all mankind elements of the object and purpose in the *CAMLR Convention* has firm roots in the *Antarctic Treaty*.<sup>144</sup> However, the rational use and conservation<sup>145</sup> elements of the object and purpose in the *CAMLR Convention* are unique to the context from which the convention arose.

Article II of the *CAMLR Convention* is the source of the use and conservation principles. It spells out the objective of the convention and articulates an ecosystem approach<sup>146</sup> to

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<sup>140</sup> *Antarctic Treaty*, Article IX(1) (f):preservation and conservation of living resources in Antarctica; Jessica Nilsson, Elizabeth A Fulton, Marcus Haward, Craig Johnson, ‘Consensus management in Antarctica’s high seas – Past success and current challenges’ (2016) 73 *Marine Policy* 172, 173.

<sup>141</sup> New Zealand, *CCAMLR in the Antarctic Treaty System* 2006/WP14/ATCM-5, 3.

<sup>142</sup> *Ibid*; *CAMLR Convention* Preamble, Articles III, IV, V, XV; Article V is not of direct interpretative relevance and so has not been discussed.

<sup>143</sup> New Zealand, *CCAMLR in the Antarctic Treaty System* 2006/WP14/ATCM-5, 3.

<sup>144</sup> *CAMLR Convention*, Preamble; *Antarctic Treaty*, Preamble.

<sup>145</sup> Although Article IX(1)(f) of the *Antarctic Treaty* recognises the role of member states in drafting and proposing measures for the preservation and conservation of Antarctic living resources.

<sup>146</sup> *CAMLR Convention* Article II.3.c.; Nilsson et al, above n 124, 176.

marine living resource management.<sup>147</sup> Article II.1 sets out conservation and use in the following terms:

1. The objective of this Convention is the conservation of Antarctic marine living resources.
2. For the purposes of this Convention, the term 'conservation' includes rational use.

On this basis, conservation, including rational use is the foremost principle of the *CAMLR Convention* object and purpose. Article II.3 goes on to define rational use through a number of principles of conservation by which harvesting and associated activities are to be conducted.<sup>148</sup>

The definition of rational use is part of the object and purpose of the *CAMLR Convention*, as well as part of the substantive obligations on states party. Firstly, it indicates that the conservation and use of marine living resources as an essential aspect of Commission decision-making under the convention. Secondly, the interpretation of rational use in the decision-making of the Commission under the *CAMLR Convention* affects the object and purpose construction, and vice versa; interpretation and application over time can account for subsequent practice or agreement. Rational use and conservation are essential to the practices of the Commission, as later aspects of Article II make clear:

3. *Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation:*
  - a) *prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size*

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<sup>147</sup> Lawrence Cordonnery, Alan D Hemmings, Lorne Kriwoken, 'Nexus and Imbroglia: CCAMLR, the Madrid Protocol and Designating Antarctic Marine Protected Areas in the Southern Ocean' (2015) 30 *The International Journal of Marine and Coastal Law* 727, 735; Denzil GM Miller, Eugene N Sabourenkov, and David C Ramm, 'Managing Antarctic Marine Living Resources: The CCAMLR Approach' (2004) 19(4) *The International Journal of Marine and Coastal Law* 317, 317.

<sup>148</sup> Dr Robert Hofman, *The intent of Article II of the CAMLR Convention* (Discussion paper for Sessions Two and Three) ASOC website (no date)

[http://www.asoc.org/storage/documents/Meetings/CCAMLR/symposium/Official\\_version\\_Article-II-of-the-CAMLR-Convention-ASOC.pdf](http://www.asoc.org/storage/documents/Meetings/CCAMLR/symposium/Official_version_Article-II-of-the-CAMLR-Convention-ASOC.pdf).

*should not be allowed to fall below a level close to that which ensures the greatest net annual increment;*

- b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in sub-paragraph (a) above; and*
- c) prevention of changes or minimisation of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.*

These fundamental principles have significant influence in the work of the Commission and its Scientific Committee. Article II affects the drafting, deliberation and passage of conservation measures, and other substantive functions of the Commission as they provide the object and purpose boundaries for conservation and rational use.

The preventative aspect of Article II.3 is clearly marked by the use of the word 'prevention'. However, changes to the substantive application of Article II.3 reflect subsequent practice incorporating applicable international law rules that override 'prevention'.<sup>149</sup> This affects the object and purpose as much as interpretation of convention obligations.<sup>150</sup> Interpretation of Article II of the *CAMLR Convention* by the CAMLR Commission has expanded the preventative approach to incorporate the precautionary approach.<sup>151</sup> The precautionary approach<sup>152</sup> was stipulated under the *Fish Stocks Agreement* and other international agreements and instruments, and has been incorporated into CAMLR Commission conservation measures and scientific

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<sup>149</sup> *Vienna Convention*, Article 31(3)(c).

<sup>150</sup> Nilsson, Fulton and Haward, above n 140, 172.

<sup>151</sup> Miller, Sabourenkov, and Ramm, above n 147, 317.

<sup>152</sup> Delegation of Australia, *The Relevance to CCAMLR of the UN Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* CCAMLR-XV/12 Rev 1, 1 and 5.



modelling. This has created subsequent practice<sup>153</sup> in the application of the precautionary approach norm, expanding the fundamental principles of conservation under Article II.3.

The change lies in the difference between prevention and precaution. Prevention is an approach that relies on certainty of scientific knowledge.<sup>154</sup> The precautionary approach is action consistent with the precautionary principle in that uncertainty or a lack of scientific knowledge should not be a reason to delay cost effective action to prevent or address potential and serious environmental degradation.<sup>155</sup> This means that the conservation and use aspects of object and purpose have been affected by developments in international environmental law.<sup>156</sup> These changes are consistent with the principles of effectiveness and contemporaneity.<sup>157</sup>

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<sup>153</sup> I Everson and W K de la Mare, 'Some Thoughts on Precautionary Measures for the Krill Fishery' (1996) 3 *CCAMLR Science* 1; CCAMLR meeting reports show that discussion among members at the Commission meetings of precautionary measures began as early as CCAMLR-IX in 1990 around the krill fisheries - *CCAMLR-IX Meeting of 22 October – 2 November 1990*, 'Report of the Ninth Meeting of the Commission' (Hobart, Australia, adopted 2 November 1990) [4.15], [8.2 – 8.12]; the 15<sup>th</sup> meeting of the CAMLR Commission indicates that the Commission, by consensus, endorsed the use of a precautionary approach to *Dissostichus eleginoides* (Patagonian Toothfish) fisheries: *CCAMLR-XV Meeting of 21 October – 1 November, 1996*, 'Report of the Fifteenth Meeting of the Commission' (Hobart, Australia, adopted 1 November 1996) [6.7], and the use of the precautionary approach was well established practice across all fisheries in 2003: *CCAMLR-XXI Meeting of 21 October – 1 November, 2002*, 'Report of the Twenty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2002) [4.27 – 4.33], [9.5 – 9.6], [9.9 – 9.18].

<sup>154</sup> James Cameron, 'Chapter 5: The Precautionary Principle in International Law' in Tim O'Riordan, James Cameron and Andrew Jordan (eds), *Reinterpreting the Precautionary Principle* (Biddles, 2001) 113, 116.

<sup>155</sup> Carolyn E Foster, 'Methodologies and Motivations: Was Japan's Whaling Programme for Purposes of Scientific Research?' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic. Significance and implications of the ICJ judgment* (Brill, 2016) 11 -37, 21; the definition in the *Rio Declaration* at Principle 15 is: 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

<sup>156</sup> The conservation focus in the *CAMLR Convention* is a confirmation of development in the *Antarctic Treaty* to an increasing focus on the importance of conservation in the Antarctic as an object and purpose of the *Antarctic Treaty*. The *Agreed Measures for the Conservation of Antarctic Fauna and Flora* was drawn up at the third *Antarctic Treaty*

Common concern in the *CAMLR Convention* connects the convention to its place in the ATS.

The *CAMLR Convention* replicates the *Antarctic Treaty* Preamble on peaceful purposes for the marine environment. The *Antarctic Treaty* states:

*it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.*

The *CAMLR Convention* confirms the peaceful purposes principle imported from the *Antarctic Treaty* in its Preamble:

*BELIEVING that it is in the interest of all mankind to preserve the waters surrounding the Antarctic continent for peaceful purposes only and to prevent their becoming the scene or object of international discord;*

Common concern is fundamental to the operation of the convention, and to the work of the Commission because it manifests in the consensus decision making structure<sup>158</sup> and informs deliberations of the Commission.<sup>159</sup> Common concern can be seen in the

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Consultative Meeting (ATCM), indicating the immediate consideration of the importance of conservation to the work of the ATCPs within the ATS. Subsequent practices at the ATCM indicated a continuing and extensive concern for conservation values in Antarctica. Confirmation of the subsequent practice of the ATCPs to a conservation focus is reflected in the preambular text of the *CAMLR Convention*. The *Protocol on Environmental Protection to the Antarctic Treaty* (the *Madrid Protocol*) was further confirmation of the subsequent practices of the ATS to focus on conservation, as have been the development of the *CAMLR Convention* and the *Convention on the Conservation of Antarctic Seals*. This position is further reinforced by the 2016 *Santiago Declaration*, which highlights protection and conservation of the Antarctic environment and ecosystems as a legal obligation and central focus of the *Antarctic Treaty*. The *Antarctic Treaty* object and purpose, which initially had little conservation focus, has moved in both practice and agreement toward greater engagement with the conservation aspect of the object and purpose, as well as the specific obligations under the treaty. This interpretation of the object and purpose, acknowledging the increased focus on Article IX, 1(f), is in line with *Vienna Convention*, Article 31, 3(a) and (b), and the principle of contemporaneity.

<sup>157</sup> Dawidowicz, above n 112; Moloo, 'Actions Speak Louder', above n 94, 43; Young and Sullivan, above n 111.

<sup>158</sup> Nilsson, Fulton and Haward, above n 140, 174; *CAMLR Convention*, Article XII.1.

<sup>159</sup> *CCAMLR-XXV Meeting of 23 October – 3 November, 2006*, 'Report of the Twenty-Fifth Meeting of the Commission' (Hobart, Australia, adopted 3 November 2006)

essentially peaceful ends achieved through various CAMLR Commission initiatives for conservation, such as the prevention of seabird bycatch mortality.<sup>160</sup>

As the *Law of the Sea Convention* notes, in international law states must be 'conscious that the problems of ocean space are closely interrelated and need to be considered as a whole.'<sup>161</sup> The preservation of Antarctic waters for peaceful purposes focuses on the resources and ecosystems of the Antarctic marine environment, which fits the criteria of 'common concern'. The creation of the CAMLR Convention Area, the use of the ecosystem approach, and the fact that the Convention Area is a meeting point of the Pacific, Indian and Atlantic Oceans gives us both geographical and topical commons. The preservation of the Antarctic waters for peaceful purposes and scientific cooperation can be a focus on the resources and ecosystem of the Antarctic marine environment, and a concern for the future of mankind, referencing global, topical issues including climate change, biodiversity,<sup>162</sup> and freedom from nuclear threats.<sup>163</sup> This gives the

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'Implementation of the Objectives of the Convention' [17.1] 78; *CCAMLR-XXI Meeting of 21 October – 1 November, 2002*, 'Report of the Twenty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2002) [13.9] 73; *CCAMLR-XXVIII Meeting of 26 October – 6 November 2009*, 'Report of the Twenty-Eight Meeting of the Commission' (Hobart, Australia, adopted 6 November 2009) Annex 7 'Washington Ministerial Declaration on the Fiftieth Anniversary of the *Antarctic Treaty* and the International Polar Year and Polar Science' 195; *CCAMLR-V Meeting of 8 – 19 September, 1986*, 'Report of the Fifth Meeting of the Commission' (Hobart, Australia, adopted 19 September 1986) [10] 3; and concerning continued dispute between Argentina and the United Kingdom over territorial sovereignty within the Antarctic and CCAMLR areas: *CCAMLR-XIX Meeting of 25 October – 3 November, 2000*, 'Report of the Nineteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November, 2000) [5.17] 17; *CCAMLR-XXII Meeting of 27 October – 7 November, 2003*, 'Report of the Twenty-Fifth Meeting of the Commission' (Hobart, Australia, adopted 7 November 2003) [8.65] 46.

<sup>160</sup> *Longline weighting for seabird conservation* Conservation Measure 24-02, 2014; *Minimisation of the incidental mortality of seabirds in the course of longline fishing or longline fishing research in the Convention Area* Conservation Measure 25-02, 2015; *Minimisation of the incidental mortality of seabirds and marine mammals in the course of trawl fishing in the Convention Area* Conservation Measure 25-03, 2015.

<sup>161</sup> *Law of the Sea Convention*, Preamble.

<sup>162</sup> Brunnée, above n 139, 308.

<sup>163</sup> Consider the specific recognition of the *Antarctic Treaty*, Articles I and VI, which prohibit the use of Antarctica for nuclear testing or nuclear waste dumping.

concept of ‘the interest of all mankind’ a depth of common concern that animates the object and purpose of the *CAMLR Convention*.

### 2.3.3 Other principles of the object and purpose

Two aspects of the *CAMLR Convention* that affect the operation of the convention are the freeze on sovereign claims and the keeping of Antarctica for scientific purposes. These both affect decision-making and Commission behaviours and are essential to the scientific basis for the precautionary approach and rational use under Article II, as well as the consensus decision-making of the Commission. Consensus decision-making demonstrates that no state’s will overrides that of another.

Scientific cooperation is an aspect of the object and purpose imported from the *Antarctic Treaty*. It finds expression in the *CAMLR Convention* focus on requiring a scientific basis for giving effect to Article II.<sup>164</sup> To maintain the conservation aspect of the object and purpose, rational use must be defined in accordance with Article II, and its application interpreted in line with the scientific functions of the Commission under Article IX.<sup>165</sup> The extensive mandate under Article IX for scientific research and the drafting and approval of conservation measures are the key operational aspects of the Convention. Articles XIV and XV of the *CAMLR Convention* embed the Scientific Committee in the structure of the Commission, creating a forum for scientific cooperation, and as an essential organ of the Commission. Scientific cooperation is evident in the multi-state representation of scientists within the Scientific Committee.

Scientific cooperation as an aspect of the object and purpose is a balancing mechanism that prevents political reformulation of the object and purpose. The interpretation of legal obligations under the *CAMLR Convention* is not without controversy. The given definition of rational use under Article II has not prevented some creative interpretation of the meaning of ‘rational use’ to be ‘the right to fish’,<sup>166</sup> similar to the

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<sup>164</sup> *CAMLR Convention*, Article IX.

<sup>165</sup> Nilsson, Fulton and Haward, above n 140, 175.

<sup>166</sup> Jennifer Jacquet, Eli Blood-Patterson, Cassandra Brooks, David Ainley, “Rational use’ in Antarctic waters’ (2016) 63 *Marine Policy* 28, 29, 30-31.

right contained in the *Law of the Sea Convention*.<sup>167</sup> For this interpretation to be accepted as practice would in turn affect the scope of the object and purpose through indications that the intentions of parties to the Convention have emphasized 'conservation includes rational use' to mean 'conservation includes the right to fish'. This in turn would affect the nature of precautionary and conservation principle of the object and purpose, removing the deliberative barriers that these principles bring to bear. It would also violate the principle under Article 31 of the *Vienna Convention* to give a primarily textual reading of a treaty.

There is a clear need to recognise the practical importance of scientific cooperation as a principle of the object and purpose. Difficulties with the application and interpretation of rational use in Commission discussions,<sup>168</sup> and the development of over-emphasis on harvesting versus conservation in CAMLR Commission practices<sup>169</sup> demonstrate this need. A matrix of use, conservation, common concern, and scientific cooperation together create a matrix of principles informing the interpretation of the text. This also remains faithful to the Commission's place within the ATS, and the concerns of the parties to the draft *CAMLR Convention* for conservation of Antarctic marine living resources.<sup>170</sup>

The freeze on sovereign claims to the Antarctic is a passive aspect of the object and purpose in that it is not actively engaged by any of the management tasks of the CAMLR Commission. The freezing of sovereign claims, central to the *Antarctic Treaty* is acknowledged at Article IV of the *CAMLR Convention*.<sup>171</sup> The operational aspects of the *CAMLR Convention* that express this object and purpose principle is in consensus

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<sup>167</sup> *Law of the Sea Convention*, Article 87.

<sup>168</sup> Jacquet et al., above n 166, 29, 30-31.

<sup>169</sup> New Zealand, *CCAMLR in the Antarctic Treaty System* 2006/WP14/ATCM-5.

<sup>170</sup> *Antarctic Marine Living Resources* Recommendation IX-2, *Antarctic Treaty IX of 19 September – 7 October 1977*, 'Final Report of the Ninth Consultative Meeting (London, UK, adopted 7 October 1977); ND Banks, 'Environmental Protection in Antarctica: A Comment on the Convention on the Conservation of Antarctic Marine Living Resources' (1981) *The Canadian Yearbook of International Law* 303, 309; *CAMLR Convention*, Preamble.

<sup>171</sup> *CAMLR Convention*, Article IV.

decision-making and the geographical jurisdiction that exists within the CAMLR area. For states party to the *CAMLR Convention*, the high seas begin at the Antarctic continent edge,<sup>172</sup> not at the edge of a 200nm Exclusive Economic Zone (EEZ) off the Antarctic coast, as the jurisdiction of the Commission extends down from the coordinates determined in the convention, with no exceptions.<sup>173</sup> Consequently, the maritime delimitations relating to sovereignty defined in the *Law of the Sea Convention* do not apply in the CAMLR area due to the freezing of sovereign claims.<sup>174</sup> To this degree, consensus decision-making in conservation measures in areas incorporating what areas that would otherwise be EEZs reflects acceptance of the absence of sovereign claim for the purposes of the CAMLR Commission.<sup>175</sup> For this aspect of the object and purpose to become part of overt deliberations, there would need to be a dispute over asserting Exclusive Economic Zone jurisdiction by a state party. Without this conflict the freezing of sovereign claims remains expressed through the ordinary practices of the Commission.

#### 2.3.4 Summary of the CAMLR Convention object and purpose

This section has offered an analysis of the text of the *CAMLR Convention* and its context to understand the scope of its object and purpose. The primary principles of the object and purpose are conservation, use and common concern. A clear understanding of the object and purpose provides us with the framework for analysing the contributions of NGOs in later chapters. Article II places conservation at the forefront of the *CAMLR Convention* object and purpose, within which is included rational use. Rational use is understood with reference to preventative and precautionary principles and an ecosystem approach to conservation.

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<sup>172</sup> *CAMLR Convention*, Article I(1).

<sup>173</sup> *CAMLR Convention*, Article I(4).

<sup>174</sup> Cordonnery, Hemmings, Kriwoken, above n 147, 738.

<sup>175</sup> Except in the case of France and the waters adjacent to the Crozet and Kerguelen Islands. The *Statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources* recognises that in these waters, France maintains the capacity to pass domestic regulations as it deems appropriate. Further, any CAMLR Conservation Measures that affect these waters must attain the consent of France to come into force. Although, with the continuing French membership of the Commission, this is equivalent to consensus.

Behind conservation and rational use is common concern for preserving Antarctica for peaceful purposes. All three principles are supported by scientific cooperation, which is a peaceful purpose that in turn supports the conservation and rational use principles of Article II. The freeze of sovereign claims is a passive, and accepted aspect of the object and purpose. Scientific cooperation is an important control on deliberations in the Commission, as determination of the scope of rational use is subject to scientific data.

The object and purpose of the *CAMLR Convention* is influenced by a number of sources outside the Convention itself, through the provisions in Article 31 of the *Vienna Convention*. Some, such as the *Antarctic Treaty* are referenced directly in the Convention text. Others, such as the principles from the *Fish Stocks Agreement* (which post-dates the *CAMLR Convention*) have been incorporated through subsequent practice recognising these relevant rules of international law. Others are implicitly part of the structure of the *CAMLR Convention* object and purpose, such as the duty to cooperate and responsibility for high seas management of marine living resources. Other principles, such as common future, are the recognition of global issues within the regional focus.

### 2.3.5 The object and purpose in the *Whaling Convention* text

This section constructs the object and purpose of the *Whaling Convention* in relation to a number of key principles, using the same process as with the *CAMLR Convention*, with reference to the textual and contextual interpretative methods of Article 31 of the *Vienna Convention*. Relevant rules of international law and common agreements are considered.

As with the *CAMLR Convention*, the core principles of the *Whaling Convention* are use, conservation and common concern, with a functional emphasis on use and conservation. The object and purpose has only one additional principle and that is an emphasis on human welfare in relation to exploitation of whaling resources.<sup>176</sup>

The intention of this chapter is to provide a neutral, legal and apolitical understanding of the object and purpose, rooted solidly in the text of the treaty. To aid this, the object and purpose of the *Whaling Convention* in this section incorporates only consensus-based agreement on the nature of the object and purpose within the Commission and

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<sup>176</sup> *Whaling Convention*, Article V.2(d).

only rules of international law that are the subject of a memorandum of understanding (MOU) or have the status of a norm in international law.

The Preamble is the primary source for understanding the object and purpose<sup>177</sup> in the *Whaling Convention*, read in conjunction with the treaty as a whole. Article I of the *Whaling Convention* acknowledges the *Schedule* as part of the Convention. There is also specific context, in the form of an Agreement and instruments agreed between parties to be relevant to interpretation at the time of drafting,<sup>178</sup> and the issue of subsequent practice and agreement indicating the incorporation of international law norms into the understanding of the object and purpose of the *Whaling Convention*.<sup>179</sup> The invocation of *travaux préparatoires* as a means of determining the object and purpose is rejected, in light of the hierarchy between Articles 31 and 32 of the *Vienna Convention*,<sup>180</sup> and the clarity possible from examination of the text and context without recourse to supplementary materials.

Outside the text of the *Whaling Convention*, the precautionary approach,<sup>181</sup> the duty to cooperate,<sup>182</sup> and the *Law of the Sea Convention* are relevant rules of international law. However, the *Law of the Sea Convention* Articles on marine mammals contribute very little to the interpretation or application of the *Whaling Convention*.<sup>183</sup> The relationship between the *Whaling Convention* and the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)*<sup>184</sup> and the *Convention on Biological*

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<sup>177</sup> Bowman, above n 119, 320.

<sup>178</sup> *Whaling Convention*, Preamble; *Vienna Convention*, Article 31(2)(a) and (b).

<sup>179</sup> *Vienna Convention*, Article 31.

<sup>180</sup> Ulf Linderfalk, 'Is the hierarchical structure of Articles 31 and 32 of the *Vienna Convention* real or not? Interpreting the rules of interpretation' (2007) 54(1) *Netherlands International Law Review* 133.

<sup>181</sup> Foster, above n 155; *Rio Declaration*, Principle 15.

<sup>182</sup> Young and Sullivan, above n 111, 5.

<sup>183</sup> Malgosia Fitzmaurice, 'The *Whaling Convention* and Thorny Issues of Interpretation' in Fitzmaurice, Malgosia and Dai Tamada (eds), *Whaling in the Antarctic. Significance and implications of the ICJ judgment* (Brill, 2016) 55.

<sup>184</sup> *Convention in International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973 993 UNTS243 (entered into force 1 July 1975).



*Diversity (CBD)*<sup>185</sup> are the subject of memoranda of understanding (MOUs) that give primary jurisdiction for the regulation of whaling to the Whaling Commission.<sup>186</sup> Within the Commission the establishment of a Southern Atlantic Whale Sanctuary has been characterized by its proponents as necessary for compliance with the *Law of the Sea Convention* on marine mammals, and with the *CBD*.<sup>187</sup> The precautionary approach is a norm of international environmental law,<sup>188</sup> and recognized by the Whaling Commission as part of the *Whaling Convention* conservation principle.<sup>189</sup> The duty to cooperate is inherent in the international legal system and within the Whaling Commission itself via the *Whaling Convention*.<sup>190</sup>

Use and conservation are the central principles of the object and purpose of the *Whaling Convention*. This reflects the decision of the ICJ in *Whaling in the Antarctic*.<sup>191</sup> The commentary in the ICJ decision on the object and purpose of the *Whaling Convention* was brief. In paragraphs [56–57] the judgment of the Court recognised that the primary heads of the object and purpose were use and conservation, and that these cannot be separated.<sup>192</sup> The Court also noted that ‘amendments to the schedule and recommendations by the IWC may put an emphasis on one or the other objective

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<sup>185</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS 32; 1769 UNTS 79 (1992) 31 ILM 818 (entered into force 29 December 1993).

<sup>186</sup> Fitzmaurice, above n 183.

<sup>187</sup> *IWC 60<sup>th</sup> Meeting of June 2008*, ‘Annual Report of the International Whaling Commission 2008 – covering the 2007-2008 financial year’ (Santiago, Chile, adopted June 2008) Brazil explaining, and paraphrasing the preambular phrase as ‘safeguarding whale stocks for future generations’ excluding ‘great natural resource’ and conservation reflecting compliance with the *Convention Biological Diversity* and the *Law of the Sea Convention*, 25-26.

<sup>188</sup> Jonathan B Wiener, ‘Precaution’ in Bodansky, Brunnée and Hey, above n 134, 599; Daniel Bodansky, ‘Deconstructing the Precautionary Principle’ in Caron DD and HN Scheiber (eds), *Bringing New Law to Ocean Waters* (Brill, 2004) 381; Ulrich Beyerlin, ‘Policies, Principles, and Rules’ in Bodansky, Brunnée and Hey, above n 134, 440.

<sup>189</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226, [107]: ‘The Parties agree that the RMP is a conservative and precautionary management tool’.

<sup>190</sup> Young and Sullivan, above n 111, 22.

<sup>191</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226, [56 – 57].

<sup>192</sup> Young and Sullivan, above n 111, 13.

pursued by the Convention, but cannot alter its object and purpose.’<sup>193</sup> This was, in effect, a repudiation of the Australian argument that subsequent practice and relevant rules of international law had extinguished the industrial use aspect of the Convention. To have use without conservation or conservation without use would create conditions in which aspects of the treaty would be rendered meaningless, violating the principle of effectiveness. This is central to an apolitical understanding of the *Whaling Convention* object and purpose, and to surmounting historically dominant division in the Commission between pro-whaling and anti-whaling Contracting Governments and NGOs.

The *Whaling Convention* structure has a strong focus on use and conservation, neither of which can be alienated from the core logic of the treaty. This focus on use and conservation is highlighted in the powers of the Commission defined at Article V, which are powers of amendment of the *Schedule* for ‘regulations with respect to the conservation and utilization of whale resources.’ The *Schedule* confirms the place of ‘use’ in relation to whales with the extent of its definitions at C. General. The definitions provided are of ‘strike’, ‘take’, ‘lose’, ‘dauhval’<sup>194</sup>, ‘lactating female’ and ‘small-type whaling’. Other structural aspects of the Convention and *Schedule* confirming the use focus are Article I(2) of the Convention, defining the extent of application of the Convention, which covers factory ships, land stations and whale catchers – all of which are defined in Article II. Under the *Schedule*, Part II. Seasons, the regulations are broken into ‘Factory Ship Operations’, ‘Land Station Operations’ and ‘Other Operations’; Part III. Capture creates classifications of area and division limits for the operation of factory, and other whaling ships, as well as stock classification. Parts IV, V and VI concern the process once a catch has been brought on board, with IV. Treatment, V. Supervision and Control, and VI. Information Required. The use aspect of the Convention and *Schedule* are clear and unambiguous, just as the conservation aspect of Article V can easily be incorporated into the same regulatory measures for use, found in the *Schedule*.

The centrality of both use and conservation is also evident in the *Whaling Convention* Preamble, which provides:

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<sup>193</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226, [56].

<sup>194</sup> A dauhval being any unclaimed dead whale found floating: *Schedule to the Whaling Convention*, C. General.

*The Governments whose duly authorised representatives have subscribed hereto,*

*Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;*

*Considering that the history of whaling has seen overfishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing;*

*Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources;*

*Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;*

*Recognizing that in the course of achieving these objectives, whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers;*

*Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the International Agreement for the Regulation of Whaling, signed in London on 8th June, 1937, and the protocols to that Agreement signed in London on 24th June, 1938, and 26th November, 1945; and*

*Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry;*

As the Table below demonstrates every significant phrase in the Preamble references conservation *and* use. Each paragraph of the Preamble can be distilled to: 'safeguard a natural resource', 'protect from over-fishing', 'increase numbers through whaling regulation', 'capture without endangering', 'achieve stock increase without economic or nutritional distress', 'confine exploitation to permit recovery', 'regulation of whale fisheries for conservation', and proper conservation to develop the whaling industry'. The reasons for pursuing conservation are clear: resource use, both at the time of drafting and into the future. The intention to address this conservation need through proper regulation of exploitation and use is equally clear.

<b>Phrase</b>	<b>Conservation</b>	<b>Use</b>	<b>Common concern</b>
<i>interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks</i>	X	X	X
<i>the history of whaling has seen overfishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing</i>	X	X	
<i>whale stocks are susceptible of natural increases if whaling is properly regulated</i>	X	X	
<i>increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources</i>	X	X	
<i>in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress</i>	X	X	X
<i>whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers</i>	X	X	
<i>establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks</i>	X	X	
<i>a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry</i>	X	X	

*Table 2.1 Preambular phrasing in the Whaling Convention: use, conservation and common concern*

The *Whaling Convention* preamble considers use and conservation as interconnected principles – neither can exist without the other. The *Convention* is, after all, a *Convention for the Regulation of Whaling*, indicating that use is a key aspect, as much as conservation.

Two aspects of the Preamble were not examined in the *Whaling in the Antarctic* case: the notion of future generations and the reference to the principles of the 1937 *International Agreement for the Regulation of Whaling (the Agreement)*,<sup>195</sup> and its Protocols.<sup>196</sup> Both of these are secondary principles to the use and conservation aspects of the object and purpose. Australia and Japan made extensive submissions on the

<sup>195</sup> *International Agreement for the Regulation of Whaling* opened for signature 8 June 1937, 1946 ATS 10 (entered into force 7 May 1938) ('8 June 1937 Whaling Agreement').

<sup>196</sup> Protocol for the Regulation of Whaling for the 1947-48 Season, opened for signature 2 December 1946, 1948 ATS 5 (entered into force 5 February 1948); Protocol amending the International Agreement for the Regulation of Whaling of 8 June 1937, and the Protocol for the Regulation of Whaling 24 June 1938, 1947 ATS 9 (entered into force 3 March 1947).

nature of the object and purpose of the *Whaling Convention*.<sup>197</sup> Both parties made submissions that accepted that the two primary aspects of the object and purpose are conservation and use.<sup>198</sup> Australia diverged from this perspective by arguing that subsequent practice and relevant rules of international law had altered the object and purpose to such a degree that conservation has become preservation,<sup>199</sup> and so subsumed the use aspect of the *Whaling Convention*. This would violate the principle of effectiveness and is not accepted here.

Supporting the essential interconnection of use and conservation are principles from the earlier *International Agreement for the Regulation of Whaling (the Agreement)*,<sup>200</sup> and its Protocols,<sup>201</sup> recognised in the Preamble as the basis on which to ‘establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks’. The *Agreement* states that the Contracting Governments desire ‘to secure the prosperity of the whaling industry and, for that purpose, to maintain the stock of whales’.<sup>202</sup> The *1947 Protocol*, specifically addressing post-war issues of food supply and the utility of increased whale catches to

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<sup>197</sup> ‘Memorial – Government of Australia’, *Whaling in the Antarctic* [2014] ICJ Pleadings, Chapter 2, Part C: The object and purpose of the ICRW; ‘Counter-Memorial – Government of Japan’, *Whaling in the Antarctic* [2014] ICJ Pleadings, Introduction, Part B.1; Chapter 2, section 3.

<sup>198</sup> ‘Memorial – Government of Australia’, *Whaling in the Antarctic* [2014] ICJ Pleadings [2.19 – 2.20]; ‘Counter-Memorial – Government of Japan’, *Whaling in the Antarctic* [2014] ICJ Pleadings [6.1 – 6.6].

<sup>199</sup> ‘Memorial – Government of Australia’, *Whaling in the Antarctic* [2014] ICJ Pleadings [2.46].

<sup>200</sup> *International Agreement for the Regulation of Whaling* opened for signature 8 June 1937, 1946 ATS 10 (entered into force 7 May 1938).

<sup>201</sup> *Protocol for the Regulation of Whaling for the 1947-48 Season*, opened for signature 2 December 1946, 1948 ATS 5 (entered into force 5 February 1948); *Protocol amending the International Agreement for the Regulation of Whaling of 8 June 1937 and the Protocol for the Regulation of Whaling 24 June 1938*, 1947 ATS 9 (entered into force 3 March 1947).

<sup>202</sup> *International Agreement for the Regulation of Whaling* opened for signature 8 June 1937, 1946 ATS 10 (entered into force 7 May 1938).

feed the population, addresses the need to ‘meet the emergency produced by post-war conditions without prejudice to the conservation of stocks of whales’.<sup>203</sup>

The concern for stock replenishment through industry regulation and human reliance on whale stocks of the earlier instruments are significant to the *Whaling Convention*, both through the *Protocols* and the text of the Convention itself.<sup>204</sup> An important principle is clearly the consideration of the impact of conservation on human populations, in managing whale stocks.

The *1947 Protocol* and the *Agreement* do not give clear guidance on assessing whether catch quotas are ‘without prejudice to the conservation of whales’. The *1948 Protocol* highlights the balance between conservation and use. The preamble in the *1948 Protocol* states ‘having due regard both to the world shortage of oil and fats and to the necessity for the conservation of the whale stocks.’ While this particular concern with a shortage of oils and fats is no longer a problem, it reinforces the *1947 Protocol* consideration of the impact on human populations. Subsequent practices of the Commission continue to recognise the human impact.

The second paragraph of the Preamble refers to the common concern of safeguarding the resource of whale stocks for future generations. Later, the Preamble references the common interest in achieving optimal levels of whale stock to prevent widespread economic or nutritional distress. This latter paragraph has diminished relevance because of the lack of widespread economic or nutritional dependence on whale stocks. However, the former paragraph continues to have great significance. In terms of international law rules, this paragraph evokes connections to intergenerational equity,<sup>205</sup> and the Brundtland Report *Our Common Future*,<sup>206</sup> contemplating the intergenerational considerations of conservation. The interest in future generations as a question of common concern refers to ‘entitling, perhaps even requiring, all states to

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<sup>203</sup> *Protocol for the Regulation of Whaling for the 1947-48 Season*.

<sup>204</sup> *Whaling Convention*, Article V(2)(d).

<sup>205</sup> Dinah Shelton, ‘Equity’ in Bodansky, Brunnée and Hey, above n 134, 643-644.

<sup>206</sup> Brundtland, above n 91.

cooperate internationally to address the concern.’<sup>207</sup> Common concern, or a concern for future generations is language familiar to other RFB treaties.<sup>208</sup> Within the Whaling Commission, reference to concern for future generations in the reasoning of Contracting Governments has been a regular feature of meetings in the 21<sup>st</sup> century, across the breadth of Commission membership from both sides of the conservation/use debate,<sup>209</sup>

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<sup>207</sup> Jutta Brunnée, ‘Common Areas, Common Heritage, and Common Concern’ in Bodansky, Brunnée and Hey, above n 134, 566.

<sup>208</sup> *Convention on the Conservation and Management of High Migratory Fish Stocks in the Western and Central Pacific Ocean*, opened for signature 5 September 2000, 2275 UNTS 43 (entered into force 19 June 2004) Preamble; *Convention on the Conservation and Management of the High Seas Fishery Resources in the South Pacific Ocean*, opened for signature 14 November 2009, 113 UNTS 2 (entered into force 24 August 2012) Preamble; *Agreement for the Establishment of the Regional Commission for Fisheries (RECOFI)*, opened for signature 11 November 1999 UNTS 2144 (entered into force 26 February 2001) Preamble; *The Antigua Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC)*, opened for signature 14 November 2003, 80 UNTS 4 (entered into force 27 August 2010) Preamble; *Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic (NAMMCO Agreement)*, opened for signature 9 April 1992, 1954 UNTS 4 (entered into force 8 July 1992) Preamble.

<sup>209</sup> *IWC 52<sup>nd</sup> Annual Meeting of July 2000*, ‘Annual Report of the International Whaling Commission 2000 – covering the 1999-2000 financial year (51<sup>st</sup>)’ (Adelaide, Australia, adopted July 2000) Republic of Guinea Opening Statement, 11; *IWC 53<sup>rd</sup> Annual Meeting of July 2001*, ‘Annual Report of the International Whaling Commission 2001 – covering the 2000-2001 financial year (53<sup>rd</sup>)’ (London, United Kingdom, adopted July 2001) Japan on safe sea food for future generations, 29; *IWC 54<sup>th</sup> Annual Meeting of May 2002*, ‘Annual Report of the International Whaling Commission 2002 – covering the 2001-2002 financial year (54<sup>th</sup>)’ (Shiminoseki, Japan, adopted May 2002) Portugal Opening Statement, 8; Italy on small-type whaling, 37; Japan on marine food safety, 39; *IWC 64<sup>th</sup> Annual Meeting of July 2012*, ‘Annual Report of the International Whaling Commission 2012 – covering the 2011-2013 financial year (64<sup>th</sup>)’ (Panama City, Panama, adopted July 2012) Appendix 9 Statement of the Aboriginal Subsistence Whaling Caucus, Denmark, Russian Federation, St Vincent and the Grenadines, USA, 92; *IWC 55<sup>th</sup> Annual Meeting of June 2003*, ‘Annual Report of the International Whaling Commission 2003 – covering the 55<sup>th</sup> 2002-2003 financial year’ (Berlin, Germany, adopted June 2003) New Zealand on the *Berlin Initiative* [4.2], 8; Annex C, Annex II: IWC Conservation Work, *An Annotated Compilation* (1976 – 2001) 61, 68, 75; *IWC 56<sup>th</sup> Annual Meeting of July 2004*, ‘Annual Report of the International Whaling Commission 2004 – covering the 2003-2004 financial year’ (Sorrento, Italy, adopted July 2004) Belgium Opening Statement, 6; *IWC 58<sup>th</sup> Meeting of June 2006*, ‘Annual Report of the International Whaling Commission 2006 – covering the 2005-2006 financial year’ (St Kitts and Nevis, West Indies, adopted June 2006) Israel Opening Statement, 6; *IWC 59<sup>th</sup> Meeting of May 2007*, ‘Annual Report of the International Whaling Commission 2007 – covering the 2006-2007 financial year’ (Anchorage, Alaska, USA, adopted May 2007) intensive debate on a Resolution on the

indicating a recognition of its relevance as an objective of the Convention. Concern for future generations also featured in the MOU between the *Whaling Convention* Secretariat and the Secretariat for the *Convention on the Conservation of Migratory Species of Wild Animals (CMS)*.<sup>210</sup>

Discussion of the common concern – future generations has not given rise to meaningful consensus within the Commission on the content of object and purpose of the *Convention* or the direction of the Commission. Where consensus exists on a Resolution no subsequent substantive agreements have emerged, and where no consensus exists on a Resolution, the three-fourth majority voting rule has prevented subsequent practice developing to affirm a conservation interpretation of ‘future generations’.<sup>211</sup>

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non-lethal use of cetaceans between conservation and use states, debating the meaning of the objective, and the interpretation of the second preambular paragraph on future generations, 46-47, the *Resolution on the non-lethal use of cetaceans* 2007-7, IWC/59/29 was carried 42 for, 2 against, 2 abstention and 20 not participating; *IWC 60<sup>th</sup> Meeting of June 2008*, ‘Annual Report of the International Whaling Commission 2008 – covering the 2007-2008 financial year’ (Santiago, Chile, adopted June 2008) Brazil explaining, and paraphrasing the preambular phrase as ‘safeguarding whale stocks for future generations’ excluding ‘great natural resource’ and conservation reflecting compliance with the *Convention Biological Diversity* and the *Law of the Sea Convention*, 25-26; *IWC 61<sup>st</sup> Meeting of July 2009*, ‘Annual Report of the International Whaling Commission 2009 – covering the 2008-2009 financial year’ (Funchal, Madeira, Portugal, adopted July 2009) Cambodia in discussion of the Irrawaddy dolphin in the Mekong River, 30; *IWC 63<sup>rd</sup> Meeting of July 2011*, ‘Annual Report of the International Whaling Commission 2011 – covering the 2010-2011 financial year’ (St Helier, Jersey, adopted July 2011) the Secretariat discussed the value of information and education on whales to future generations, 104-105.

<sup>210</sup> *IWC 52<sup>nd</sup> Annual Meeting of July 2000*, ‘Annual Report of the International Whaling Commission 2000 – covering the 1999-2000 financial year (51<sup>st</sup>)’ (Adelaide, Australia, adopted July 2000) Appendix 2: Memorandum of Understanding between the Secretariat of the International Whaling Commission (IWC Secretariat) and the Secretariat of the *Convention on the Conservation of Migratory Species of Wild Animals (CMS)* (UNEP/CMS Secretariat).

<sup>211</sup> *IWC 55<sup>th</sup> Annual Meeting of June 2003*, ‘Annual Report of the International Whaling Commission 2003 – covering the 55<sup>th</sup> 2002-2003 financial year’ (Berlin, Germany, adopted June 2003) Annex C, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission*, Resolution 2003-1, IWC/55/4Rev2; the Commission vote on this Resolution was passed 25 for, 20 against with 1 abstention, diminishing the value of this conservation-oriented Resolution; *IWC 56<sup>th</sup> Annual Meeting of July 2004*, ‘Annual Report of the International Whaling Commission 2004 – covering the 2003-2004 financial year’ (Sorrento, Italy, adopted July 2004) Annex C, *Resolution on Japanese Community-based Whaling* Resolution 2004-2, IWC/56/2 Rev1, 67, was



As regards the object and purpose there has been an absence of consensus on the direction of the Whaling Commission under its convention.<sup>212</sup> However, one area of meaningful consensus has been the substantial amendments to the *Rules of Procedure* to reflect serious pursuit of consensus decision-making and an end to polarisation of the Commission.<sup>213</sup>

Finally, it is necessary to address reliance on scientific data as an aspect of the object and purpose. Science-based management being an aspect of the object and purpose, it is a tool of substantive obligations but not part of the object and purpose. The subsequent practice of the Whaling Commission in establishing the Scientific Committee has affected the interpretation of substantive obligations in such a way as to indicate that conservation and use both rely on best scientific evidence. Both Australia and Japan accepted the importance of the Scientific Committee to the functioning of the Commission under the *Whaling Convention*.<sup>214</sup> However, this is a matter of interpretation and implementation of substantive functions, rather than alteration of the object and purpose. Unlike in the *CAMLR Convention*, scientific advice is not an aspect of the Convention structure or object and purpose. But it is a tool of application that aids in the carrying out of the object and purpose.

The interpretation of the *Whaling Convention* has been impacted by its age, as many of the environmental issues that have arisen were not thought of in 1949.<sup>215</sup> In addition,

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passed by consensus but the recognition of the value of whaling to small communities and their future generations has not led to the allocation of whaling quotas for Japanese coastal small-type whaling communities.

<sup>212</sup> *IWC 59<sup>th</sup> Meeting of May 2007, 'Annual Report of the International Whaling Commission 2007 – covering the 2006-2007 financial year' (Anchorage, Alaska, USA, adopted May 2007), 31; Resolution on the extension of Small Working group on the Future of the IWC until the 62<sup>nd</sup> Annual Meeting of the Commission 2009-1, IWC/61/10 amended.*

<sup>213</sup> *Reforming the working procedures of the IWC IWC/60/24; Progress Report on the September 2008 meeting of the Small Working Group (SWG) on the Future of the International Whaling Commission presented by Alvaro de Soto, SWG Chairman, St Petersburg, Florida, USA IWC/S08/Rep 1; An overview of the elements/issues identified as being of importance to one or more Contracting Governments in relation to the future of the IWC IWC/S08/SWG 3.*

<sup>214</sup> *Whaling in the Antarctic (Judgment) [2014] ICJ Reports 226, [83], [109], [159].*

<sup>215</sup> Young and Sullivan, above n 111, 2.

the three-fourths majority voting structure causes issues with subsequent practice as there is very little consistency of interpretative expectations among member states.<sup>216</sup> The controversy surrounding whaling in international politics has also created circumstances of great difficulty in interpreting and applying the Convention.<sup>217</sup> Fitzmaurice has written extensively on the many issues that are present through Article 31(3)(c) of the *Vienna Convention*, concerning the application of relevant rules of international law in understanding the object and purpose of the *Whaling Convention*.<sup>218</sup> There are also many reference points that highlight the fundamental conflict in position within the Whaling Commission.<sup>219</sup> However, by simply considering the fundamental terms of the convention, and its object and purpose, in light of consensus decisions and broader environmental principles of customary international law, a clear, and apolitical interpretation is possible.

#### 2.3.6 Summary of the *Whaling Convention* object and purpose

The *Whaling Convention* has two primary focal points of use and conservation. Both are subject to the duty to cooperate in relation to conserving the great natural resource represented by whale stocks for future generations, and concern for the human impact of effective regulation. In practice, the effect of the object and purpose on the decisions of the Commission is without direction, due in large part to the division in the Commission between pro- and anti- whaling factions. The use and human concern aspect of whaling decisions remain actively engaged through aboriginal subsistence whaling (ASW) regulation, and conservation also remains a dominant concern through the Scientific Committee, and various Resolutions of the Commission on conservation issues. The common concern for future generations' access to whale resources is a significant aspect of conservation, but its practical implementation is hampered by the decision-making processes of the Commission. The place of science in relation to the

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<sup>216</sup> *Whaling Convention*, Article III.2.

<sup>217</sup> Fitzmaurice, above n 183, 55.

<sup>218</sup> Fitzmaurice above n 183, 92-99 [4.2].

<sup>219</sup> Fitzmaurice above n 183, 66-79 [2.3]; 'Memorial – Government of Australia', *Whaling in the Antarctic* [2014] ICJ Pleadings; 'Counter-Memorial – Government of Japan', *Whaling in the Antarctic* [2014] ICJ Pleadings; *St. Kitts and Nevis Declaration* Resolution 2006-1 IWC/58/16.

object and purpose is clearly as a means of implementation of substantive functions of the Commission under the Convention. It is not part of the object and purpose. The precautionary approach is part of the functional definition of conservation in international law. This has affected the object and purpose of the *Whaling Convention* as the Commission must now consider the precautionary approach in its deliberations and decision-making.

## 2.4 Conclusion: use, conservation, science and mankind

This chapter lays the foundation for the rest of the thesis by providing a clear summary of the object and purpose of each convention, in order to appraise NGO behaviours in light of the object and purpose. The next chapter contains an analysis of the Conventions in terms of their jurisdiction and functions, and the provisions for engagement with non-state actors. The Articles of the *Whaling and CAMLR Conventions* that provide for non-state actor engagement are analyzed using an object and purpose analysis. Following from this, the case study chapters describe and evaluate NGO behaviours and their engagement with the object and purpose of the Conventions.

Both the *Whaling and CAMLR Conventions* have use and conservation as interconnected and interdependent principles of the object and purpose. Supporting these dominant principles in both Conventions is the satellite principle of a common concern for the conservation or preservation of the area or species within the jurisdiction of the Convention. A point of difference between the *Whaling Convention* and *CAMLR Convention* is the nature of scientific advice. The *CAMLR Convention* has scientific considerations as part of the object and purpose, and science is an integral part of the Convention, whereas the *Whaling Convention* contains no scientific principle. Furthermore, scientific considerations are a tool for adherence to the substantive obligations of the *Whaling Convention*, and the consideration of the object and purpose, but are not embedded in the object and purpose. The resulting confusing may impact on the clarity of decision-making and the basis for these decisions.

The *Whaling Convention* contains very little guidance on the content of conservation or use, where the *CAMLR Convention* contains extensive reference to principles and functions that direct the capacity of the Commission and its Scientific Committee to make recommendations and decide on Measures that implement the object and

purpose. As explored in the next chapter, while the functions of the Commissions have significant overlap, the presence or absence of scientific conservation and use parameters is a Convention feature that affects NGO behaviours. The fidelity with which Articles of the Conventions are interpreted with reference to the object and purpose, the care with which NGO engagement is filtered through these Articles, and in how the *Rules of Procedure* reflect this interpretation, are also significant aspects of analysing NGO engagement through substantive and administrative obligations.

The next chapter, Chapter Three, takes the object and purpose of the conventions and provides a discussion of each Commission's jurisdiction through significant Articles of the conventions. This adheres to the *Vienna Convention*. Chapter Four sets the scene for discussing the case studies in Chapters Five, Six and Seven.

## Chapter 3: The *International Convention for the Regulation of Whaling* and the *Convention on the Conservation of Antarctic Marine Living Resources*

### 3.1 Introduction

This chapter evaluates the *International Convention for the Regulation of Whaling* (the *Whaling Convention*) and the *Convention on the Conservation of Antarctic Marine Living Resources* (the *CAMLR Convention*). The historical context of the two conventions is discussed, considering the relevant historical factors that influenced their drafting. Also explored are the subject matter and jurisdiction, how these differ and how subject matter and jurisdiction influence the operation of the Commissions under the conventions. The contents of the conventions are discussed using an object and purpose analysis. This analysis is divided into three sections: membership, voting and reservations; and substantive powers. The influence of the object and purpose in interpretation is made clear, with Article 31 of the *Vienna Convention* the starting point for exploring the provisions of the *Whaling* and *CAMLR Conventions*.

The purpose of this chapter is to give an interpretation of the conventions in line with their object and purpose. It provides the context for the composition of Commission membership, the decision-making processes of the Commissions, and the substantive work of the Commissions outside of diplomatic and scientific meeting spaces. This chapter also provides the working context for the interpretation and application of the non-state actor provisions that are discussed in Chapter 4 on NGO behaviours.

The last chapter considered the object and purpose of the *Whaling and CAMLR Conventions*, noting the overlaps of principle in the object and purpose in relation to conservation, use and a common concern for humankind in the present and future. The difference in relation to the place of the Scientific Committee was also noted. This chapter applies the methodology of the object and purpose in treaty interpretation to examine the Articles in relation to non-state actor engagement in the *Whaling and CAMLR Conventions*.

The first section of this chapter highlights the substantive similarities and the differences of the two Conventions, the powers that are given to the Commissions through various Articles, and how these contribute to the position of NGOs in relation to the Commissions as observers, members of delegations, and even as actors outside the established frameworks. Significant similarities lie in the substantive powers of the Commissions to regulate catch limits, open and closed seasons, methods of catch and other aspects of fishing. Significant differences lie in the procedural aspects of the Conventions: state membership requirements, the voting structure, and the non-state actor engagement provisions. The second section of this chapter evaluates the nature of the Convention Articles on non-state actor engagement and how non-state actor engagement has come to be embedded in the administration of the Conventions through the Secretariats, Commissions, and *Rules of Procedure*.

This chapter concludes that the membership, jurisdiction and decision-making aspects of the two conventions create two very different Commissions. Both Commission are bounded in their work by the object and purpose interrelationship of conservation and use in relation to their jurisdiction. However, there are key differences in membership preconditions, the nature of the jurisdiction detailed in the respective Conventions, and in consensus and majority decision-making. These differences create unique circumstances in each Commission for NGO influence, and directly affect how NGO behaviours can exist within the forums of the Commissions themselves. It must be remembered that both Commissions ‘despite their regulatory powers, are essentially also political forums in which discussions and negotiations take place...’<sup>220</sup> The conventions that create these forums matter.

## 3.2 Historical context

### 3.2.1 CAMLR Convention

The 1982 *CAMLR Convention* is embedded within the Antarctic Treaty System, and so has ties to the 1959 *Antarctic Treaty*, and the concern for preservation of Antarctica for

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<sup>220</sup> Patricia Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching Volume II* (Oceana Publications, 1985) 642.

peaceful purposes stated within.<sup>221</sup> The *CAMLR Convention* is also a contemporary of the *Law of the Sea Convention*, having been drafted and opened for signature in the early 1980s, at a time when concern for management of common resources was high on the international agenda, post-Stockholm.<sup>222</sup>

The *CAMLR Convention* was drafted amidst anticipatory concern around the potential for harm through unregulated fishing in the Southern Ocean.<sup>223</sup> Drafters of the *CAMLR Convention* were well aware of the problems that the Whaling Commission faced: no entrenched Scientific Committee, unclear conservation aims, poorly developed stock management procedures, and extremely limited knowledge of whale stocks. The watershed of the 1972 Stockholm United Nations Conference on the Human Environment and its subsequent Declaration, commonly called the '*Stockholm Declaration*', contributed to the processes within the Whaling Commission leading to the commercial whaling moratorium in 1982.<sup>224</sup> Indicative of these historical differences, the Articles of the two Conventions are markedly different in depth of detail, with the *CAMLR Convention* displaying concerted efforts to ensure a clear Convention in its object and purpose, its substantive powers, and organizational detail.

### 3.2.2 Whaling Convention

The *Whaling Convention*, despite its age, has many aspects in common with the later *CAMLR Convention*. The language of the convention is concerned with conservation and sustainable use, and it provides a number of significant regulatory measures for the Commission to use in order to conserve and use whale resources. However, the *Whaling Convention* is also, because of its age, devoid of measures by which the Commission may

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<sup>221</sup> *Antarctic Treaty*, Preamble.

<sup>222</sup> Yee Keong Choy, 'From Stockholm to Rio+20: The ASEAN Environmental Paradox, Environmental Sustainability, and Environmental Ethics' (2015) 12(1) *The International Journal of Environmental Sustainability* 1, 1.

<sup>223</sup> Nilsson, Fulton and Haward, above n 140, 173.

<sup>224</sup> Anastasia Telesetsky and Seokwoo Lee, 'After *Whaling in the Antarctic*: Amending Article VIII to Fix a Broken Treaty Regime' (2015) 30 *The International Journal of Marine and Coastal Law* 700, 702; Robert J Hofman, 'Sealing, whaling and krill fishing in the Southern Ocean: past and possible future effects on catch regulations' (2017) 53(268) *Polar Record* 88, 91.

impose penalties or require its Contracting Governments to impose domestic penalties on flag state vessels.

The *Whaling Convention* has strong elements – the interrelationship of use and conservation, as well as concern for the long-term sustainability of whale resources are clear concerns underpinning the work of the Commission in its text. However, three aspects of the convention clearly create divisive issues within the Commission: The voting structures, which require between a simple and two-thirds majority; the capacity of Contracting Governments to object to and so not be bound by schedule amendments; and the open membership structure,<sup>225</sup> which requires only the depositing of an instrument of ratification. Together, these create a Commission that is prone to division, conflict, and partisan political control that steers away from the original intent of the Commission, without the strength to effect sufficient interpretative change so as to move the Commission away from being a use-oriented body.

### 3.2.3 Discussion

The spirit of the *Whaling Convention* is clearly aimed at rehabilitating whale stocks sorely tried by over a century of unregulated use, but the capacity for states to direct their own scientific research and to object to any amendments to the *Schedule* of conservation and regulation measures,<sup>226</sup> makes the Convention toothless. The context of its drafting includes two earlier instruments that had clear interests in the human value of the whaling industry, its support, and continuation. These interests are specifically referred to in the *Whaling Convention* preambular text, as are the earlier instruments.

The *Whaling and CAMLR Conventions* opened for signature just over 35 years apart, the *Whaling Convention* in 1946 and the *CAMLR Convention* in 1980. The circumstances of their drafting were vastly different. The *Whaling Convention* opened for signature in a climate of particular concern about declining commercial whale stocks – arguably, one

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<sup>225</sup> Shirley V Scott, 'Intergovernmental Organizations as Disseminators, Legitimizers, and Disguisers of Hegemonic Policy Preferences: The United States, the International Whaling Commission, and the Introduction of a Moratorium on Commercial Whaling' (2008) 21(3) *Leiden Journal of International Law* 581, 591 and 600.

<sup>226</sup> *Whaling Convention*, Articles 5.3(a) and 8.1.



of the most significant environmental issues of the 20<sup>th</sup> century.<sup>227</sup> The 1946 *Whaling Convention* has historical roots in the 1937 *International Agreement for the Regulation of Whaling*,<sup>228</sup> but the 1946 *Convention* emerged around the same time as the *Charter of the United Nations*, during an upswing in international legal cooperation preceding and following the end of the Second World War.<sup>229</sup>

The *CAMLR Convention*, coming out of the 1970s and mounting concern about environmental management of global commons, is a forceful contrast to the loose, and undemanding language of the *Whaling Convention*, which has no enforcement procedures, and relies heavily on the good faith of states to carry out their treaty obligations.

### 3.3 Jurisdiction and geographical operation

The *Whaling* and *CAMLR Conventions* regulate marine living resource use in the Southern Ocean. The Southern Ocean is globally important because it is home to a variety of unique species – krill, fish, seals, whales, birds – and ecosystems.<sup>230</sup> It is also a significant area for researching the impacts of climate change.<sup>231</sup> The *Whaling*

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<sup>227</sup> Jacques-Yves Cousteau and Yves Paccalet, *Jacques Cousteau Whales* (Abrams & Allen, 1988) 7; Peter Convey and Marc Lebouvier, 'Environmental change and human impacts on terrestrial ecosystems of the sub-Antarctic islands between their discovery and the mid-twentieth century' (2009) 143(1) *Papers and Proceedings of the Royal Society of Tasmania* 33, 35 & 39; Charlotte Epstein, 'The Making of Global Environmental Norms: Endangered Species Protection' (2006) 6(1) *Global Environmental Politics* 32, 32 and 43.

<sup>228</sup> *International Agreement for the Regulation of Whaling*, opened for signature 8 June 1937, 1946 ATS 10 (entered into force 7 May 1938).

<sup>229</sup> Dan Plesch and Thomas G Weiss, '1945's Forgotten Insight: Multilateralism as Realist Necessity' (2016) 17 *International Studies Perspectives* 4, 7.

<sup>230</sup> Valerie J Loeb, 'Climate variability and spatiotemporal dynamics of five Southern Ocean species' (2015) 134 *Progress in Oceanography* 93; Jessica Melbourne-Thomas et al., 'Optimal control and system limitation in a Southern Ocean ecosystem model' (2015) 114 *Southern Ocean Dynamics and Biogeochemistry in a Changing Climate, Deep-Sea Research Part II* 64; Surma, Szymon, Pakhomov, Evgeny and Pitcher, Tony J, 'Effects of Whaling on the Structure of the Southern Ocean Food Web: Insights on the "Krill Surplus" from Ecosystem Modelling' (2014) 12(9) *PLOS ONE*; Knox, George A, *Biology of the Southern Ocean* (Knox, 2006).

<sup>231</sup> Julian Gutt et al., 'The Southern Ocean ecosystem under multiple climate change stresses – an integrated circumpolar assessment' (2015) 21 *Global Change Biology*

*Convention* regulates conservation and use of cetacean species in the Southern Ocean through the establishment of the Southern Ocean Whale Sanctuary, the commercial whaling moratorium, and some oversight of scientific whaling. The *CAMLR Convention* regulates the protection of vulnerable marine ecosystems, krill and Toothfish fisheries below the Antarctic Convergence and in adjacent high seas waters, through conservation measures. At the 2016 annual meeting, the CAMLR Commission also added marine protected areas (MPAs) to its protection mandate.

The conventions establish the only two regional fishery bodies that operate in the 20.33 million kilometres of Southern Ocean. Globally, the *Whaling Convention* also regulates catch limits for aboriginal subsistence whaling as well as whale killing methods, and marine threats to cetacean health and populations. The overlap between the Southern Ocean Whale Sanctuary and the CAMLR Convention area is significant, with the borders of the sanctuary starting at 40° south (see below Figure 3.1). To this extent the operation of the *CAMLR Convention* is comparable with that of the *Whaling Convention*, however the *Whaling Convention* has global aspects to its jurisdiction that are not geographically comparable with the *CAMLR Convention*. So, while the *Whaling Convention* applies to *all cetaceans* and the CAMLR Convention to a geographical area, the geographical focus of both Commissions has strong connections.

### 3.3.1 CAMLR Convention

The *CAMLR Convention* is a zonal management treaty, with a regional focus; its coverage is the waters of the Southern Ocean below the Antarctic Convergence<sup>232</sup> (the 'Convention Area'). The commercially-fished species that are within this management

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1434; Andrew J Constable et al, 'Climate change and Southern Ocean ecosystems I: how changes in physical habitats directly affect marine biota' (2014) 20 *Global Change Biology* 3004; Rodhouse, Paul GK, 'Role of squid in the Southern Ocean pelagic ecosystem and the possible consequences of climate change' (2013) 95 *Deep Sea Research Part II: Topical Studies in Oceanography* 129; Paul Newman et al., 'The Effects of Interactive Stratospheric Chemistry on Antarctic and Southern Ocean Climate Change in AOGCM' (NASA Technical Reports, NASA Center for Aerospace Information (CASI), Fall Meeting, 2014); Adams, Neil, 'Climate Trends at Macquarie Island and Expectations of Future Climate Change in the Sub-Antarctic' (2009) 143(1) *Papers and Proceedings of the Royal Society of Tasmania* 1.

<sup>232</sup> Article I(4) of the *CAMLR Convention* deems the Antarctic Convergence to be the following: 50°S, 0°, 50°S, 30°E; 45°S, 30°E; 45°S, 80°E; 55°S, 80°E; 55°S, 150°E; 60°S, 150°E; 60°S, 50°W; 50°S, 50°W; 50°S, 0°.

area and regulated by the CAMLR Commission are Antarctic krill (*Euphausia superba*), Patagonian toothfish (*Dissostichus eleginoides*), Antarctic toothfish (*D mawsoni*), (Mackerel icefish (*Champsocephalus gunnari*), Lanternfish (*Electrona carlsbergi*), Grey rockcod (*Notothenia squamifrons*) and Antarctic crabs (*Paralomis spinosissima* and *P. formosa*).<sup>233</sup>

The boundaries of the CAMLR Convention Area are divided into statistical subareas for the purposes of research and fishing catch allocation.<sup>234</sup> The boundaries of the Area range from 45° south in the Western Indian Ocean sector, including the McDonald, Heard, Kerguelen, Crozet, Prince Edward and Marion Islands<sup>235</sup> to 60° south in the Southwest Pacific region, encompassing the Ross Sea. While the geographical coordinates vary, the Convention Area is generally the high seas area below the Antarctic Convergence. Within the Convention Area, the McDonald, Heard, Kerguelen, Crozet, Prince Edward and Marion Islands belong to member states, and are surrounded by Exclusive Economic Zones (EEZs). States with fishing interests within their EEZ below the Antarctic Convergence have applied the conservation measures decided by the CAMLR Commission to fishing activities within those waters.<sup>236</sup> The ongoing diplomatic dispute between the United Kingdom and Argentina over the Falkland Islands has prevented any application of *CAMLR Convention* obligations to those waters through the Commission.<sup>237</sup>

The Commission Secretariat is located in Hobart, where the annual meetings of Commission and Scientific Committee take place.<sup>238</sup> Working Groups, *ad hoc*

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<sup>233</sup> Delegation of Australia, *The Relevance to CCAMLR of the UN Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* CCAMLR-XV/12 Rev 1, 4.

<sup>234</sup> See below, Figure 3.1.

<sup>235</sup> The subject of Australian, French and South African national jurisdictions.

<sup>236</sup> *Statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources* (1982).

<sup>237</sup> For an example of the diplomatic badinage around the Falkland Islands see: *CCAMLR-XVIII Meeting of 25 October – 5 November 1999*, 'Report of the Eighteenth Meeting of the Commission' (Hobart, Australia, adopted 5 November 1999) [5.37], [13.1], [17.2-17.3].

<sup>238</sup> *CAMLR Convention*, Article XIII.3.

committees, workshops and other meetings take place around the world, in various Contracting Party territories.

### 3.3.2 Whaling Convention

The *Whaling Convention* is a species-specific management treaty. It applies globally for all Contracting Parties, in respect of a number of cetacean species, including highly migratory species. Whether it covers all cetacean species, including dolphins, is a contentious issue in the Commission: while the *Whaling Convention* Preamble states that the *Convention* is concerned to ‘protect all species of whales from further over-fishing’, there is some dispute about whether this includes dolphins and non-commercial cetacean species, or only those listed in the *Schedule*.<sup>239</sup> Conservation of small cetaceans has been on the Scientific Committee agenda since as early as 1982.<sup>240</sup> The Small Cetaceans Voluntary Fund was established in 2009 to address conservation issues with dolphin species, succeeding earlier expenditure on research into small cetacean conservation.<sup>241</sup> However, there is no consensus on this practice within the

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<sup>239</sup> *IWC 52<sup>nd</sup> Annual Meeting of July 2000*, ‘Annual Report of the International Whaling Commission 2000 – covering the 1999-2000 financial year (51<sup>st</sup>)’ (Adelaide, Australia, adopted July 2000) *Chairman’s Report of the 52<sup>nd</sup> Annual Meeting*, [8.1], 17: the Chair recognised that ‘the IWC has no competence in regulating killing methods of small cetaceans’ while the contrary view was put forward by New Zealand; [17.1.4], 46, Japan ‘reiterated its view that the management of small cetaceans is outside the Commission’s competence.’; *IWC 55<sup>th</sup> Annual Meeting of June 2003*, ‘Annual Report of the International Whaling Commission 2003 – covering the 55<sup>th</sup> 2002-2003 financial year’ (Berlin, Germany, adopted June 2003) *Chair’s Report of the 55<sup>th</sup> Annual Meeting* [1.3], 5, Nicaragua disputed the Commission’s mandate over small cetaceans; [15.1], 21 Denmark and Norway; also [15.1.1] Japan; 35, Russia; 36, Denmark.

<sup>240</sup> *IWC 51<sup>st</sup> Annual Meeting of May 1999*, ‘Annual Report of the International Whaling Commission 1999 – covering the 50<sup>th</sup> financial year 1998-1999’ (Grenada, adopted May 1999) *Chairman’s Report of the 51<sup>st</sup> Annual Meeting*, Agenda Item 19 IWC’s Competence to Manage Small Cetaceans, 42; IWC Scientific Committee, ‘2003 Report of the Scientific Committee’ (2004) 6 *Journal of Cetacean Resource Management (Suppl)* 1, Agenda Item 13 [13.1], 34.

<sup>241</sup> *IWC 52<sup>nd</sup> Annual Meeting of July 2000*, ‘Annual Report of the International Whaling Commission 2000 – covering the 1999-2000 financial year (51<sup>st</sup>)’ (Adelaide, Australia, adopted July 2000) *Chairman’s Report of the 52<sup>nd</sup> Annual Meeting* ‘Appendix 3: Income and Expenditure Account for 2000-2001’, 60; *IWC 51<sup>st</sup> Annual Meeting of May 1999*, ‘Annual Report of the International Whaling Commission 1999 – covering the 50<sup>th</sup> financial year 1998-1999’ (Grenada, adopted May 1999) ‘Budget 1999-2000 Income and Expenditure Account’, 57; *IWC 50<sup>th</sup> Annual Meeting of May 1998*, ‘Annual Report of

Commission<sup>242</sup> and small cetacean conservation activities are not indicative of subsequent practice affecting the interpretation of the *Convention* or *Schedule* in relation to defining 'all species of whales'. The *Whaling Schedule* defines Baleen and Toothed whales<sup>243</sup> but not whales generally. To this extent, the absence of a general definition, and the specific references to species of commercial interest indicates that the *Whaling Convention* and its *Schedule* are concerned with the regulation of commercial whale species, and not whales in general.

Unlike zonal management, species management of highly migratory species can create conflict among parties to a treaty as the effect of exploitation along migratory routes may be detrimental, or the science is unclear as to the impact on later sections of the migration route. As discussed below, jurisdiction, and membership and voting rules in the *Whaling Convention* create a situation in which a majority of Contracting Governments lack an interest in commercial whaling but have an interest in non-lethal whale-oriented industries, such as whale watching.<sup>244</sup> This has given rise to a significant political impasse in the Whaling Commission around whether the interests of states prevail over the rule of law presented by the *Whaling Convention* itself.

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the International Whaling Commission 1998 – covering the 1997-98 financial year (49<sup>th</sup>)' (Muscat, Oman, adopted May 1998) 'Income and Expenditure 1998', 59; *IWC 47<sup>th</sup> Annual Meeting of May/June 1995*, 'Forty-Sixth Report of the International Whaling Commission – covering the 46<sup>th</sup> financial year 1994-1995' (Dublin, Ireland, adopted June 1995) 4, where expenditure was £286.

<sup>242</sup> *IWC 55<sup>th</sup> Annual Meeting of June 2003*, 'Annual Report of the International Whaling Commission 2003 – covering the 55<sup>th</sup> 2002-2003 financial year' (Berlin, Germany, adopted June 2003) *Chair's Report of the 55<sup>th</sup> Annual Meeting* [1.3], 5, Nicaragua disputed the Commission's mandate over small cetaceans; [15.1], 21 Denmark and Norway; also [15.1.1] Japan; 35, Russia; 36, Denmark. *IWC 52<sup>nd</sup> Annual Meeting of July 2000*, 'Annual Report of the International Whaling Commission 2000 – covering the 1999-2000 financial year (51<sup>st</sup>)' (Adelaide, Australia, adopted July 2000) *Chairman's Report of the 52<sup>nd</sup> Annual Meeting*, [8.1], 17: the Chair recognised that 'the IWC has no competence in regulating killing methods of small cetaceans' while the contrary view was put forward by New Zealand; [17.1.4], 46, Japan 'reiterated its view that the management of small cetaceans is outside the Commission's competence.'

<sup>243</sup> *Whaling Convention Schedule I*. Interpretation 1A and B. Baleen whale being whales with baleen in the mouth, or other than a toothed whale: blue, bowhead, Bryde's, fin, grey, humpback, minke, pygmy right, and sei whales. Toothed whale: any whale which has teeth in the jaws: beaked, bottlenose, killer, pilot, and sperm whales.

<sup>244</sup> Hofman, above n 224, 92.

Alternatively, if the use made of the *Whaling Convention* by current parties can alter the object and purpose of the *Convention* and so redirect the Commission to a purely conservation-based mandate.

### 3.3.3 Discussion

The management system of the *CAMLR Convention*, which stipulates the necessity of considering the Antarctic marine ecosystem as well as individual species management in its conservation measures, avoids the issues that have presented under the *Whaling Convention*.<sup>245</sup> The ecosystem approach under the *CAMLR Convention* ultimately addresses what the *Whaling Convention*, as a species management treaty struggles to address: the place of cetacean species within an ecosystem.<sup>246</sup> The mandated ecosystem considerations in Article II of the *CAMLR Convention* give clear parameters for both political deliberations and scientific advice. Species managed by the CAMLR Commission are considered within the broader ecosystem context by both the Commission and its Scientific Committee because of the terms of Article II. The broad remit for conservation measures also gives the CAMLR Commission a clear mandate to address issues such as pollution and bycatch.<sup>247</sup>

By contrast, the Whaling Commission has no context for considering the ecosystem within the terms of the *Whaling Convention*.<sup>248</sup> The broad terms of consideration under both Articles IV and V give rise to uncertainty about what precisely falls within the meaning of phrases such as: ‘information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon’; ‘methods of maintaining and increasing the population of whale stocks’; ‘regulations with respect to the conservation and utilization of whale resources’. Consideration of ecosystem management could fall within these phrases but what the precise contents of these

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<sup>245</sup> The *CAMLR Convention* specifically recognises the jurisdiction of the *Whaling Convention* and the *Convention on the Conservation of Antarctic Seals* over cetacean and seal species for management purposes. The Scientific Committee does take account of these species in ecosystem modelling but does not account for management.

<sup>246</sup> Hofman, above n 224, 637.

<sup>247</sup> Hofman, above n 224, 92-94.

<sup>248</sup> Birnie, above n 220, 637.

broad statements are is difficult for the Commission to determine. The regulation of the whaling industry was clearly addressed in the early years of the Commission although the conservation effect of that regulation was contested.

With the suspension of commercial whaling imminent in the late 1970s, the regulatory purview of the Commission expanded to include aboriginal subsistence whaling. The inclusion of aboriginal subsistence whaling within a treaty that alleges to be for the regulation of commercial whaling was accepted. But the inclusion of the regulation of small cetacean species has remained outside the Commission's accepted jurisdiction as a 'voluntary fund', rather than a true aspect of Commission work. At the time of the implementation of the moratorium there were hopes among some in the academic, NGO and non-whaling country community that the Commission would turn its full attention to the conservation of whales in place of whaling, and to the regulation of whale-watching, rather than consumptive use of whales.<sup>249</sup> This has not come to fruition in the Whaling Commission, but it has resulted in complex regulatory issues coming before the Commission.

The fragmentations of intention and focus are arguably a result of the unclear terms of the *Whaling Convention* on what subject matter falls within the scope of the convention. Conversely, inclusion for regulation of aspects of whale killing methods has led to acceptance by most Contracting Parties. These aspects of whale hunting clearly attach to the language of Article IV.1.e 'time, methods, and intensity of whaling' and f. 'types and specifications of gear and apparatus and appliances which may be used'. The clarity with these functional questions, as opposed to the broader questions of whether ecosystem management should be central to the considerations of the Whaling Commission in managing whale stocks, is straightforward.

NGO roles meet at a complex intersection of characteristics within the two Commissions. The intersections of the CAMLR Commission's work are clearly rooted in the text of the *CAMLR Convention*, with clear Commission commentary on its own role and treaty interpretation. NGOs in the CAMLR Commission must fit within this environment where the text of the convention is deeply significant to Commission deliberations. The Whaling Commission is hampered by the general language of the

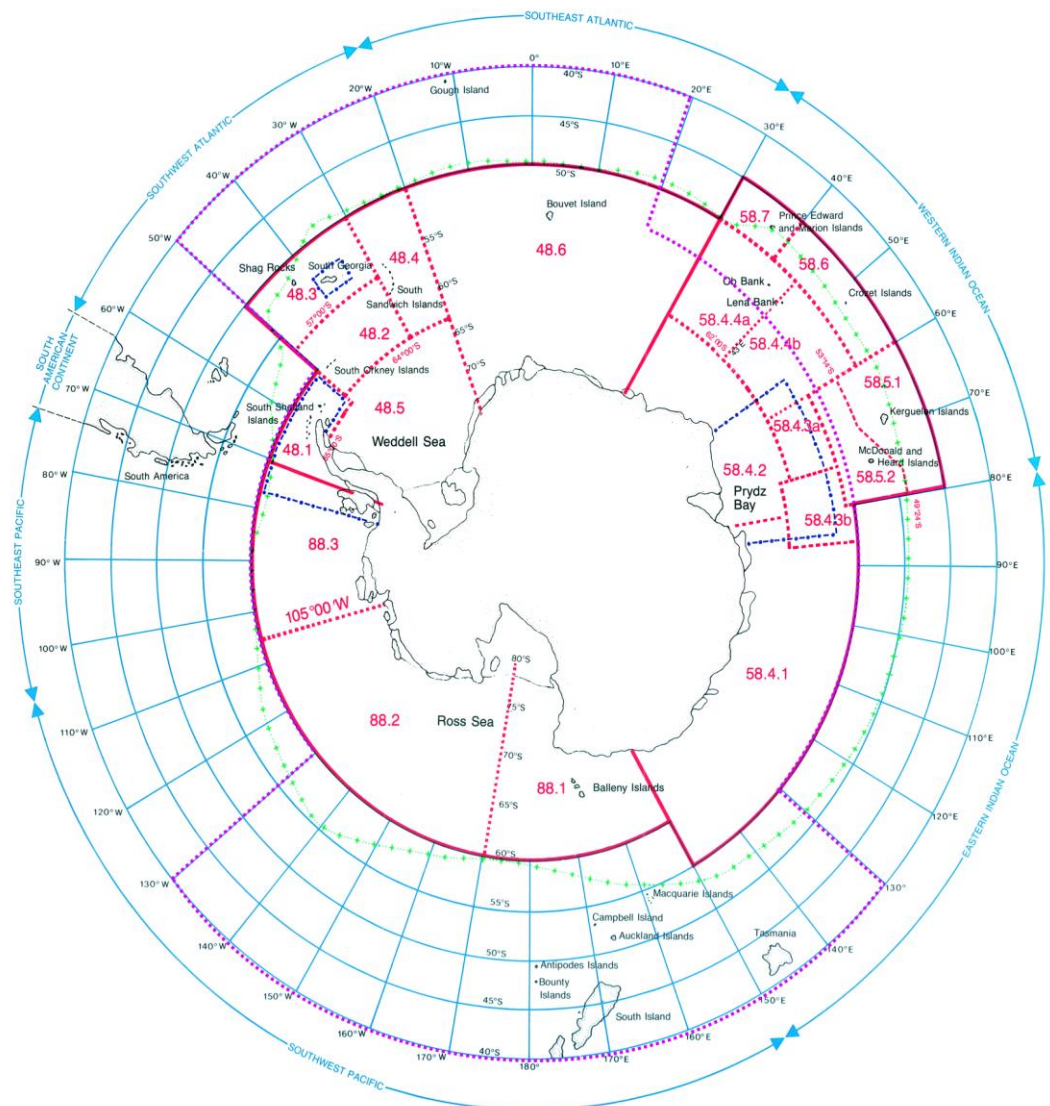
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<sup>249</sup> Birnie, above n 220.

*Whaling Convention*, finding the roles of NGOs placed within a confusing intersection of interpretation. The precise nature of the work of the Commission is not clear by the terms of its own convention, and what the Commission can do when there is no commercial whaling, is not easily determined by either commentators or the Commission, with such political variation available in interpretation of the treaty text.

The clarity and the confusion of the CAMLR Commission and Whaling Commission respectively, are in contrast to each other, and can be directly connected to the contents of the treaties and their management terms.





*Image 3.1 Official CCAMLR Map with Whaling Convention Southern Ocean Whale Sanctuary in purple dot (original map courtesy of CCAMLR Secretariat; additions courtesy of Dr Petr Smejkal)*

As can be seen from Image 3.1 the Southern Ocean Whale Sanctuary (SOWS), defined in the *Whaling Convention Schedule* overlaps the CAMLR Convention Area to a significant degree, with only a small part of the CAMLR Convention Area outside of the SOWS, and the SOWS extending to a large area in the Southwest Pacific, beyond the CAMLR Convention Area. This demonstrates the jurisdictional geographical overlap in the Southern Ocean, although it should be remembered that as a global RFB, the *Whaling Convention* applies across all high seas and into coastal waters, attaching to species rather than geography.

### 3.4 Membership and voting

Membership and voting structures, while they may not seem to bear on the place of NGOs in the CAMLR and Whaling Commissions are central to the political atmosphere that prevails in each Commission. This in turn impacts on the status accorded to NGOs. The discretion-dependent access NGOs enjoy to speaking rights is reflective of the political climate of the Commission. The value with which NGO documents, both formal and informal, are approached, is also dependent on the political climate. The significance of this is that in the CAMLR and Whaling Commissions, the diametrically opposed membership and voting structures have given rise to two very different organizational climates. These appear connected to the number of observers and to the roles accorded to NGOs.

#### 3.4.1 CAMLR Convention

Article XII(1) of the *CAMLR Convention* stipulates consensus decision making for all matters of substance.<sup>250</sup> A simple majority is sufficient for matters that are not of substance, though this is rare.<sup>251</sup> Provision is also made for the taking of a secret ballot when asked for.<sup>252</sup>

The *CAMLR Convention* recognises contracting parties and members. Only members have a right to vote in the CAMLR Commission. There are two categories of membership. The first category is State Parties that were involved in the drafting processes and meetings for the establishment of the *CAMLR Convention*.<sup>253</sup> The second category is acceding states engaging in research or extraction of marine living resources in the CAMLR Area. Contracting Parties who do not engage in research or extraction of marine living resources in the CAMLR Area are not entitled to membership.<sup>254</sup> In this way, the *CAMLR Convention* distinguishes clearly between contracting parties and

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<sup>250</sup> *CAMLR Convention*, Article XII(1).

<sup>251</sup> *CAMLR Convention*, Article XII (2).

<sup>252</sup> *CAMLR Commission Rules of Procedure*, Rule 5.

<sup>253</sup> *CAMLR Convention*, Article VII(2)(a).

<sup>254</sup> *CAMLR Convention*, Article VII(2)(b).

members.<sup>255</sup> There are, as of 2017, 11 contracting parties that are not members of the Commission, and 25 members.<sup>256</sup>

The requirement for members to be engaged in research or harvesting activities within the CCAMLR Area<sup>257</sup> limits membership.<sup>258</sup> Early commentary on the draft *CAMLR Convention* indicates that this was a deliberate choice to locate control of decision-making with the parties affected by decisions.<sup>259</sup> The result of pre-*CAMLR Convention* meetings was a coupling of this limited membership with consensus. By limiting the field of voters to those with a direct interest in the region, and requiring substantive decision-making to be consensus-based, the *CAMLR Convention* emphasises cooperative action in the Antarctic.<sup>260</sup> Consensus voting also avoids prejudicing the position of Contracting Governments, unlike the majority voting of the *Whaling Convention*. However, reservations under Article IX(6)c and the Chairman's Statement provide for the capacity of any Contracting Government to maintain domestic policy despite decisions of the Commission.

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<sup>255</sup> *CAMLR Convention*, Article VII 2(a) and (b).

<sup>256</sup> *CCAMLR Basic Documents*, Preface iii.

<sup>257</sup> *CAMLR Convention*, Article X.

<sup>258</sup> Of the current 36 Contracting Parties, 11 are acceding states, not members, and so do not have a vote. The original fourteen (14) member states are now 13, with the reunion of the German Democratic Republic and the Federal Republic of Germany. The European Economic Community was also a member at the first CAMLR Commission meeting. With 11 acceding states and 14 original members (including the now European Union) leaves an increase of 11 member states. With 25 current members, an increase of only 11 votes has occurred in the 34 years since the first meeting of the CAMLR Commission.

<sup>259</sup> Australia, *Commentary on the Draft Convention on the Conservation of Antarctic Marine Living Resources*, *Antarctic Treaty Ninth Consultative Meeting*, Provisional Agenda Item 6 (London, 19 September 1977) ANT/IX/21, *CAMLR Convention*, Draft Article 3 [2]; *CAMLR Convention*, Draft Article II (3) 9.

<sup>260</sup> Working Group, *Draft Report of the Working Group on Marine Living Resources*, *Antarctic Treaty Ninth Consultative Meeting*, Agenda Item 6 (London, 7 October 1977) ANT/IX/82 Rev 1, *CAMLR Convention* Draft Article II.1(a) at 4; United States, *Draft Recommendation on Antarctic Marine Living Resources submitted by the United States*, *Antarctic Treaty Ninth Consultative Meeting*, Agenda Item 6 (London, 23 September 1977) ANT/IX/43 at 3, [2].

### 3.4.2 Whaling Convention

The *Whaling Convention* stipulates a three-fourths majority for amendments to the *Convention Schedule* and a simple majority for other decisions of the Commission.<sup>261</sup> Amendments to the *Schedule* involve amendments to whale killing methods, whaling seasons and locations, size and sex of whales, and other matters related to the hunting and processing of whales. The ‘other decisions’ of the Commission in Article III include Resolutions, which if passed by consensus contribute to the interpretation of the *Convention* and the *Schedule*.<sup>262</sup> This is an important limitation on the simple majority: where consensus on a Resolution has not been reached, the consequence is that the Resolution has no impact on interpretation of Member State obligations under the *Whaling Convention*.

The three-fourths majority is arguably a major contributory factor in several issues involving NGOs in the Whaling Commission. Vote-buying<sup>263</sup> and voting blocs have contributed to a divisiveness in the Whaling Commission since the early 1980s that has not emerged in the CAMLR Commission. Much of the anti-whaling sentiment can be traced to domestic campaigns of NGOs in western democracies.<sup>264</sup> Domestic behaviour is outside of the scope of this thesis, but the weakness of the three-fourths majority is important as it amplifies issues in diplomatic relationships between member states in the Whaling Commission and draws a contrast in relation to the capacity for NGO influence.

No provision is made in the *Whaling Convention* for amendment of the Convention itself. Articles 40 and 41 of the *Vienna Convention* permit the amendment of Convention Articles, subject to the right of Contracting Governments to lodge an objection to any such amendment, and for individual Contracting Governments to agree on alteration of terms of a Convention between those states. The *Vienna Convention* is silent on the numbers needed for such amendment, not indicating whether consensus or a majority

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<sup>261</sup> *Whaling Convention*, Article III(2).

<sup>262</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226 [46]; *Whaling Convention*, Article VI.

<sup>263</sup> Andrew Gillespie, *Whaling Diplomacy* (Edward Elgar, 2005) 425-446.

<sup>264</sup> Rex Weyler, *Greenpeace: An Insider's Account* (Rodale, 2004).

is necessary. The *Whaling Convention* is also silent on amendment of the Convention itself, although additions may be developed by the use of Protocols and previous practices of the Commission have been to amend the convention via consensus.<sup>265</sup>

By contrast with the CAMLR Commission, membership of the Whaling Commission has no limitations – any state that accedes to the Convention is a member, called ‘a Contracting Government’ in the Convention.<sup>266</sup> Any Government which has ‘deposited an instrument of ratification or has given notice of adherence to this Convention’<sup>267</sup> is a member. Unlike the CAMLR Convention, the *Whaling Convention* does not make distinctions between a Contracting Party and a member.<sup>268</sup> A Contracting Government that has paid its membership dues is entitled to vote, whether it was an original contracting party, or has never engaged in whaling related activities in the recent or distant past.

### 3.4.3 Discussion

The result of the jurisdiction, membership and voting structures is that the Whaling and CAMLR Commissions are two very different Commissions for NGO engagement. The open membership rules in the *Whaling Convention* have resulted in an expanding membership in the Whaling Commission:<sup>269</sup> from 15 in 1946<sup>270</sup> to the current number of 88.<sup>271</sup> The differences in membership growth between the two Conventions and Commissions are represented in Figure 2. It shows that the growth in voting members for the Whaling Commission has almost tripled since 1982 and the CAMLR Commission

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<sup>265</sup> Birnie, above n 220.

<sup>266</sup> *Whaling Convention*, Article II (4).

<sup>267</sup> *Whaling Convention*, Article II (4).

<sup>268</sup> Unlike the *CAMLR Convention*, the *Whaling Convention* does not make distinctions between a Contracting Party and a member. The only limitation to voting is that in the event of failure to pay the annual contribution, a member has its vote suspended.: *Whaling Commission Rules of Procedure*, Rule E(2)(a).

<sup>269</sup> Bowman, above n 119, 295.

<sup>270</sup> *IWC 1<sup>st</sup> Annual Meeting of 1<sup>st</sup> June 1949*, ‘First Report of the International Whaling Commission – covering the 1<sup>st</sup> fiscal year 1<sup>st</sup> June 1949 – 31<sup>st</sup> May 1950’ (Oslo, Norway, adopted July 1950).

<sup>271</sup> *Delegates and Observers attending the 66<sup>th</sup> Annual Meeting IWC/66/3 Rev1*.

increased by only two thirds its original size - a 300% growth versus a 66.6% growth. On its own timescale, the Whaling Commission has moved from an original membership of 15 to hover around the 90 mark, making it six times larger than when it first met in 1950.

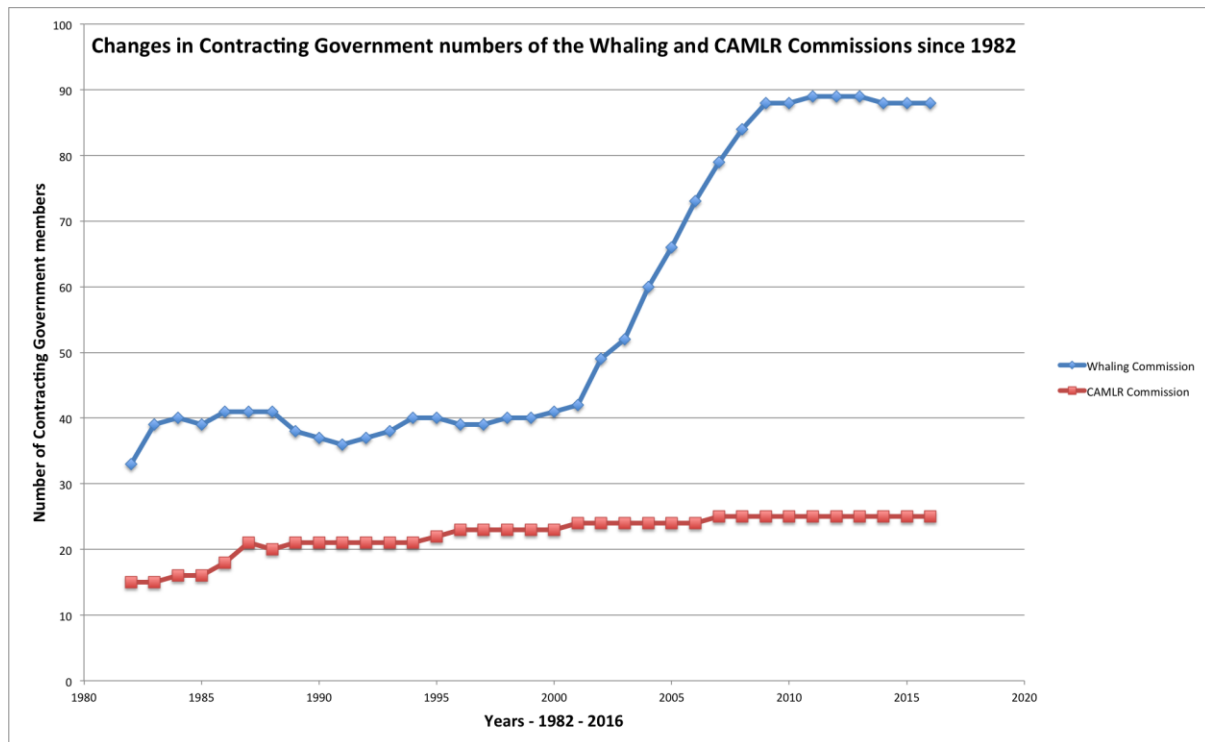


Figure 3.2 Changes in membership in the Whaling and CAMLR Commissions from 1982 - 2016

The steady, and marginal growth in state parties to the *CAMLR Convention* reflects the preconditions for application and subsequent obligations of membership. A requirement that a state be actively engaged in a fisheries area is a limitation that minimises state party numbers. By contrast, since 2000, it is clear that there has been an increase of more than double the states parties to the *Whaling Convention*. This does not mean that all state parties to the Convention lack an economic interest in whales but only a small number have active engagement with lethal whaling. The membership interests in the Whaling Commission are diverse – from landlocked Czech Republic, with no ostensible interest in whaling, to Norway, which lodged a reservation to the commercial whaling moratorium and hunts whales commercially within the Norwegian EEZ.

It is clear that the jurisdiction, membership and voting structures result in the Whaling and CAMLR Commissions being two very different Commissions for NGO engagement.



Domestic influence is a key sphere of NGO activity<sup>272</sup> and the open membership and three-quarter majority of the *Whaling Convention* leaves the Commission open to influence that is not necessarily by the terms of the treaty itself. The controlled membership and consensus voting of the *CAMLR Convention* closes avenues of influence to NGOs and reinforces the primacy of the Convention as the source of law.<sup>273</sup>

### 3.5 Substantive Powers

#### 3.5.1 CAMLR Convention

The jurisdiction and guiding principles of the *CAMLR Convention* are found in Article II, and Articles IX–XI. This jurisdiction is extensively detailed with significant provisions made for the content of conservation measures in Article IX 1(f) and (2). Conservation measures are the core means by which the CAMLR Commission achieves its work in furthering the conservation principles and object and purpose in Article II. The Commission is required to take full account of the recommendations of the Scientific Committee in making decisions.<sup>274</sup> The roles of the Commission are set out in Article IX:

*1. The function of the Commission shall be to give effect to the objective and principles set out in Article II of this Convention. To this end, it shall:*

- (a) facilitate research into and comprehensive studies of Antarctic marine living resources and of the Antarctic marine ecosystem;*
- (b) compile data on the status of and changes in population of Antarctic marine living resources and on factors affecting the distribution, abundance and productivity of harvested species and dependent or related species or populations;*
- (c) ensure the acquisition of catch and effort statistics on harvested populations;*

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<sup>272</sup> BK Woodward, 'Global Civil Society and International Law in Global Governance: Some Contemporary Issues' (2006) 8 *International Community Law Review* 247, 335; Nowrot, above n 18, 587; Charnovitz, 'Nongovernmental Organizations' above n 30, 364.

<sup>273</sup> *Charter of the United Nations, Preamble; Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, GA Res 67/1 UN GAOR, Main Comm, 67<sup>th</sup> sess, Agenda Item 83, UN Doc A/RES/67/1 (24 September 2012) [8]; Kenneth J Keith, 'John Dugard Lecture – 2015: The International Rule of Law' (2015) 28 *Leiden Journal of International Law* 403, 406, 409, 413-414.

<sup>274</sup> *CAMLR Convention*, Article IX (4).

- (d) analyze, disseminate and publish the information referred to in sub-paragraphs (b) and (c) above and the reports of the Scientific Committee;*
- (e) identify conservation needs and analyze the effectiveness of conservation measures;*
- (f) formulate, adopt and revise conservation measures on the basis of the best scientific evidence available, subject to the provisions of paragraph 5 of this Article;*
- (g) implement the system of observation and inspection established under Article XXIV of this Convention;*
- (h) carry out such other activities as are necessary to fulfil the objective of this Convention.*

These roles underscore the central importance of conservation measures. Research, data acquisition and dissemination, analysis, performance review, and enforcement procedures all support the system of conservation measures in place for the CAMLR Area. The subject matter and content of conservation measures is set out in Art IX(2):

- (a) the designation of the quantity of any species which may be harvested in the area to which this Convention applies;*
- (b) the designation of regions and sub-regions based on the distribution of populations of Antarctic marine living resources;*
- (c) the designation of the quantity which may be harvested from the populations of regions and sub-regions;*
- (d) the designation of protected species;*
- (e) the designation of the size, age and, as appropriate, sex of species which may be harvested;*
- (f) the designation of open and closed seasons for harvesting;*
- (g) the designation of the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study;*
- (h) regulation of the effort employed and methods of harvesting, including fishing gear, with a view, inter alia, to avoiding undue concentration of harvesting in any region or sub-region;*
- (i) the taking of such other conservation measures as the Commission considers necessary for the fulfilment of the objective of this Convention, including measures concerning the effects of harvesting and associated activities on components of the marine ecosystem other than the harvested populations.*



The object and purpose of conservation including rational use, and ancillary considerations is clearly identified and reiterated in Article IX (1)(e). Article IX as a whole provides extensive substantive powers to the CAMLR Commission, including the general power to take other conservation measures ‘necessary for the fulfilment of the objective of this Convention’. But it is the conjunction of extensive substantive capacities under Article IX (2) with the requirement at (1)(e) for the Commission to identify conservation needs that reinforces the direction of the conservation measures: in carrying out conservation measures, there is a requirement to consider conservation needs *and* assess the effectiveness of any conservation measure in achieving that end. The object and purpose with conservation as the dominant concern is reinforced.

Since 1982, the CAMLR Commission has utilised its substantive powers to address a number of key issues in the Antarctic: seabird bycatch mitigation, catch documentation, Vessel Monitoring Systems (VMS), a Catch Documentation Scheme (CDS) related to illegal unreported and unregulated fishing (IUU fishing), conservation management, catch method regulation and flags of convenience.<sup>275</sup> Included within this array of considerations are general fishery regulations over seasons, catch size, area, type and method.

One strength of the CAMLR Commission lies in its small size. It regulates only 24 vessels that operate in the CAMLR area, and has a strong focus on implementation and compliance, with a well-established Standing Committee on Implementation and Compliance (SCIC). The provisions of the *CAMLR Convention* also require that each Contracting Party ‘take appropriate measures within its competence to ensure compliance with the provisions’ of the *CAMLR Convention* and its conservation measures.<sup>276</sup> Contracting Parties are also expected to ‘undertake to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity contrary to the objective’ of the *CAMLR Convention*. The SCIC settles matters to be addressed by the Commission in plenary in relation to the compliance of Contracting Parties to both Articles XXI and XXII under Article X(2), which requires that:

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<sup>275</sup> See the Current Conservation measures online at CCAMLR, *Conservation Measures CAMLR* (20 October 2014) <https://www.ccamlr.org/en/conservation-and-management/browse-conservation-measures>.

<sup>276</sup> *CAMLR Convention*, Article XXI (1).

*The Commission shall draw the attention of all Contracting Parties to any activity which, in the opinion of the Commission, affects the implementation by a Contracting Party of the objective of this Convention or the compliance by that Contracting Party with its obligations under this Convention.*

The *CAMLR Convention* contains extensive powers to provide for conservation with science-regulated rational use and peaceful conduct. The Convention prioritises regulation with legal force at the domestic and international levels, with Article X creating a space for direct diplomatic engagement on the issue of compliance. Articles XXI and XXII create legal obligations to ensure domestic compliance with conservation measures, prevent breaches, report activities that are contrary to the objective of the Convention and impose sanctions within jurisdiction.

important issues of Southern Ocean conservation have been addressed by the CAMLR Commission most significantly through the use of conservation measures. In addition to this, the degree of compliance expected of Contracting Parties, and the rights of the Commission to address issues of compliance make the *CAMLR Convention* a strong Convention, particularly in comparison to the *Whaling Convention*, which exhibits a dearth of enforcement Articles and an abundance of good faith.

### 3.5.2 Whaling Convention and its Schedule

Articles IV and V of the *Whaling Convention* contain the substantive powers of the Commission, in conjunction with the *Schedule*, which is amended according to these articles. In addition to Articles IV and V, Article VI is part of the Convention prescribing the work of the Commission.

The combined effect of Articles IV, V and VI is to confer on the Commission the power to gather information about whales and whaling (IV) make decisions about whales and whaling by amending the *Schedule* (V) and make recommendations to Contracting Governments on matters relating to whales and the object and purpose of the Convention (VI). There is no stipulated connection between any of the Articles in terms of reliance on scientific or statistical information obtained under Article IV. There is no indication that Article IV is a guide for decisions or recommendations under Articles V or VI.

Article IV provides the basis for the formation of the Scientific Committee, giving the Commission power to independently organise studies and investigations into whales, whaling, statistical information on whale stocks, the impacts of whaling, and methods of increasing and maintaining whale stocks. The current moratorium on commercial whaling demonstrates a lack of connection between decisions of the Commission under Article V and the data available on whales and whaling, stock status and the other areas covered by Article IV.<sup>277</sup> The scientific data and advice provided by the Scientific Committee to the effect that management should be on a stock by stock basis<sup>278</sup> was set aside in favour of a politically acceptable alternative to have an *interim* moratorium – a temporary cessation<sup>279</sup> that has now lasted more than 30 years. While Article IV was essential to establishing the Scientific Committee, the lack of a clear connection may not be the root cause of the dissociation between data and decision, as there are indications in the CAMLR Commission that even with clear connections there can be shortfall between advice and decision.

Article V contains the most significant of the substantive powers, which is the power to amend the provisions of the *Schedule* to the *Whaling Convention*. The *Whaling Convention* and the *Schedule* operate together. Amendment of the *Schedule* falls under Article V, specifically recognised in Article III as requiring a three-quarter majority vote for amendment.<sup>280</sup> Decisions to amend the Schedule are made by the Commission on advice from the Scientific Committee, although politically fractious decisions may not follow such a clear course.

It is beyond doubt that the Scientific Committee has made significant contributions to the understanding of whale killing methods, stock status, stock management, and non-lethal research methods, with many amendments and Resolutions reflecting the strong

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<sup>277</sup> IWC Scientific Committee, '1981 Report of the Scientific Committee' (1982) 32 *Report of the International Whaling Commission* 43, 45, Agenda Item 7; 48 Agenda Item 8, [8.2.2].

<sup>278</sup> IWC Scientific Committee, '1982 Report of the Scientific Committee' (1983) 33 *Report of the International Whaling Commission* 43, 47, Agenda Item 8 [8.1].

<sup>279</sup> IWC Scientific Committee, '1982 Report of the Scientific Committee' (1983) 33 *Report of the International Whaling Commission* 43, 47, Agenda Item 8 [8.1].

<sup>280</sup> *Whaling Convention*, Article III(2).

relationship between the Scientific Committee and the Commission. However, even here there is a gap between the recommendations of the Scientific Committee and the political decisions of the Commission. For example, the conservation-oriented Revised Management Procedure (RMP) was not incorporated into the *Schedule* as the basis for catch-related decisions of the Commission, despite clear advice from the Scientific Committee of the benefits of the RMP.<sup>281</sup>

The *Schedule* is concerned with commercial whaling. This is clear from its definition section, and its overall structure. This does not exclude conservation, as indicated in Article V, but it does intertwine use and conservation. The discussions around the moratorium acknowledged this connection.<sup>282</sup> The *Schedule* contains catch allocation for aboriginal subsistence whaling,<sup>283</sup> the terms of a moratorium on commercial whaling,<sup>284</sup> the establishment of the Southern Ocean and Indian Ocean Whale Sanctuaries,<sup>285</sup> and the ban on the use of cold grenade harpoons.<sup>286</sup> The *Schedule* also notes reservations made by Contracting Governments to the regulations contained in the *Schedule*.<sup>287</sup>

The *Whaling Convention*, Article VI gives the Commission power to make recommendations to one or all Contracting Governments. These recommendations lack

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<sup>281</sup> IWC 40<sup>th</sup> Annual Meeting of July 1989, 'Fortieth Report of the International Whaling Commission – covering the 40<sup>th</sup> financial year, 1988-1989' (San Diego, US, June 1989), *Report of the Scientific Committee*, Agenda Item 7 and Annex E; IWC 43<sup>rd</sup> Annual Meeting of July 1992, 'Forty-Third Report of the International Whaling Commission – covering the 33<sup>rd</sup> financial year, 1991-1992' (Glasgow, United Kingdom, July 1992), *Report of the Scientific Committee*, Agenda Item 6, 57-61.

<sup>282</sup> For example, 'a negotiated interim cessation of commercial whaling was a reasonable alternative to other methods that have been tried to ensure the future productivity of whale resources': IWC Scientific Committee, '1982 Report of the Scientific Committee' (1983) 33 *Report of the International Whaling Commission* 43, 47 Agenda Item 8, [8.1].

<sup>283</sup> *Whaling Convention Schedule*, III Capture; Baleen Whale Catch Limits section 13.

<sup>284</sup> *Whaling Convention Schedule*, III Capture; Classification of Stocks 10(e).

<sup>285</sup> *Whaling Convention Schedule*, III Capture section 7(a) – Indian Ocean Whale Sanctuary; *Schedule* III Capture section 7(b) – Southern Ocean Whale Sanctuary.

<sup>286</sup> *Whaling Convention Schedule*, III Capture section 6.

<sup>287</sup> *Whaling Convention Schedule*, 3, footnotes; 5, footnotes; 6, footnotes.

legal force.<sup>288</sup> There is no comparison in the *CAMLR Convention* to Article VI except perhaps Article X (1), which applies to non-State parties and State parties, in addition to other enforcement requirements.<sup>289</sup> There is some uncertainty over whether Article VI is the basis for the Resolutions of the Whaling Commission, with consideration being given to Article VI as a basis for expanding the voluntary jurisdiction of the Commission in relation to small cetaceans.<sup>290</sup> This development would mean that the competence of the Commission would be divided from its object and purpose as a use-oriented conservation organization and its substantive business by a very narrow demarcation, based on the non-binding nature of Article VI.

### 3.5.3 Discussion

There is a significant difference in the clarity with which the object and purpose is articulated under the two conventions. Where the *Whaling Convention* spreads the main aspects of its object and purpose throughout the Preambular text, the *CAMLR Convention* contains its primary concerns in Article II, using direct language. Nonetheless, both conventions are concerned with the balance between conservation and use, bearing in mind the interests of future generations.

A key difference is the lack of hard regulatory power in the *Whaling Convention* as compared to the *CAMLR Convention*. Another key difference is the unclear legal relationship in the Whaling Commission between decisions of the Commission and advice from the Scientific Committee as the *Whaling Convention* makes no provision for a Scientific Committee.

Article IV of the *Whaling Convention* is comparable with Article IX(1) of the *CAMLR Convention* insofar as both Articles are concerned with the gathering of data. The

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<sup>288</sup> The terms of the *Whaling Convention*, Article VI itself are simply the power to make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of the convention. Whether, in Article VI the Commission is constituted of a consensus decision or a simple or  $\frac{3}{4}$  majority is unclear.

<sup>289</sup> *CAMLR Convention*, Articles X, XXI, XXII.

<sup>290</sup> *IWC 58<sup>th</sup> Meeting of June 2006*, 'Annual Report of the International Whaling Commission 2006 – covering the 2005-2006 financial year' (St Kitts and Nevis, West Indies, adopted June 2006) 7, Agenda Item 2.

specificity of the *CAMLR Convention* is not found in the *Whaling Convention*, which goes only so far as providing general guidelines on data to be sought through studies and investigations of whales and whaling, the collection and analysis of statistical information on trends and conditions of whale stocks and the effect of whaling activities, and the study, appraisal and dissemination of information on methods for maintenance and increase of whale stocks. Article IX(1) of the *CAMLR Convention*, by comparison is clear in its focal points and direction of research as there is a clear relationship between the Scientific Committee and the Commission.<sup>291</sup>

The regulatory powers under Article V of the *Whaling Convention* are similar to those of the *CAMLR Convention*. As with the *CAMLR Convention* Article IX(2), the powers for regulation of whaling are listed as discrete items and are comparable in their focus. As with the *CAMLR Convention* reference in Article IX to the purposes and principles of the Convention, Article V also refers to the amendments to the *Schedule* regulations being for the ‘conservation and utilization of whale resources’.

However, unlike the *CAMLR Convention*, which relies on conservation measures as the document of decision-making,<sup>292</sup> the decisions of the Whaling Commission are made through the Article V powers as amendments to the *Schedule*. Article V is the most powerful Article in the *Whaling Convention* for the Commission, as the adoption of regulations in relation to species, seasons, waters, sanctuaries, size and catch limits, time, methods, gear and other aspects of whaling are what has facilitated the work of the Commission in relation to whale killing methods, aboriginal subsistence whaling, and the commercial whaling moratorium, which came into effect in 1986. But, again – there are no provisions for enforcement of regulations in the *Whaling Convention*. This creates a weak system with no functional implementation or compliance except through expected good faith. The observer scheme trialled in the 1970s was not effective in ensuring size limits on caught whales.<sup>293</sup>

The basic powers of the two Commission are the same: the capacity for research and the capacity for decision-making. However, the *CAMLR Convention* makes clear connections

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<sup>291</sup> *CAMLR Convention*, Article IX (4).

<sup>292</sup> *CAMLR Convention*, Article IX(1)(e)(f).

<sup>293</sup> Weyler, above n 264, 312-315.

between the research to be conducted and the decisions to be made, whereas there is no direct connection between Articles IV and V in the *Whaling Convention*. The texts of the *Whaling and CAMLR Conventions* contribute to the circumstances of their current operation, but so too do the circumstances of the managed marine living resources. An additional factor to consider is how NGO engagement interacts with these factors. A clear discussion of the various powers and relationships of the Conventions and the *Schedule to the Whaling Convention* facilitates discussion in the case study chapters, with a definite reference point for weighing the behaviours of NGOs against the structures of the Conventions.

CHARACTERISTIC	CAMLR CONVENTION	WHALING CONVENTION
Opened for signature	Opened for signature 1982; entered into force 1983	Opened for signature 1946; entered into force 1953
<b>Substantive aspects of the conventions</b>		
<b>Object and purpose</b> <i>Central to the object and purpose in both Conventions</i>	Defined under Article II; clearly specified	Not specified; heavy reliance on Article 31 of the <i>Vienna Convention</i> to define from a whole-of-text reading
<b>Mandate of the Commission</b> <i>Connection to the use and conservation principles of the object and purpose</i>	Clearly and extensively defined under Articles IX, X, XI and XII with reference to specific and enumerated functions	Defined under Articles III, IV, V and VI with reference to some specific and enumerated functions, with some broad functions, less clearly defined.
<b>Jurisdiction/management</b>	Zonal – “global” beneath the Antarctic Convergence “the CCAMLR area”	<b>Species</b> – global, including territorial seas of Contracting governments, and the Southern Ocean; some confusion over degree to which ‘whale’ includes small cetaceans and extent of jurisdiction.
<b>Conservation focus</b> <i>Connection to the conservation and common future elements of the object and purpose</i>	Defined in Article II: conservation includes rational use; broad capacities for conservation measures outside of stock management	Referred to without definition: conservation measures possible through management procedures related directly to stock management
<b>Stock status</b>		
<b>Stock status</b>	<i>Dissostichus eleginoides</i> (Patagonian toothfish/Chilean Sea Bass) and krill; regulated by the Commission	With the exception of aboriginal subsistence whaling (ASW) regulated by the Commission, stock regulated by the Commission is not commercially exploited; Norway and Iceland have lodged reservations to the moratorium and continue to hunt minke whales within EEZs.
<b>Procedural and structural aspects of the Conventions</b>		
<b>Scientific Committee</b>	Scientific Committee embedded in the <i>CAMLR Convention</i> Articles XIV and XV.	Scientific Committee established under the <i>Rules of Procedure</i> with reference to Article IV of the <i>Whaling Convention</i>



CHARACTERISTIC	CAMLR CONVENTION	WHALING CONVENTION
Membership	States seeking recognition as member states under the <i>Convention</i> must be researching or harvesting Antarctic waters under Article VII requirements; allows for accession but not membership under Article XXIV	Open to any state under Article X
Voting structure	Consensus for substantive decisions, including Resolutions and conservation measures – (consensus includes abstention) Addresses the avoidance of conflict aspect of the <i>Antarctic Treaty</i>	Consensus preferred but failing this three-fourths majority for substantive decisions (amendments to the Schedule); simple majority for Resolutions of the Commission. Where consensus for subsequent practice is sought, (consensus includes abstention).
Reservations/objections	Post-consensus (often administrative, domestic issue)	Post-majority (reservations/objections often reflective of voting preference)
Place of meeting	Static – Hobart	Variable – Contracting government territories
Observer rights and obligations		
Application process	Requires statement of accord with and capacity for material support for or contribution to the principles of the CAMLR Convention	Demonstrate interest in the area with a letter of accreditation from the relevant organization represented
Accessibility for observers	Limited access – three to four NGOs invited	Open – up to, and over 100 different observers, NGOs and others
Speaking and document rights	Limited speaking rights; information documents permitted; informal roles limited	Broad speaking rights; information documents permitted; informal roles extensive
Definition of NGO	No clear definition of NGO – has categories for NGO and ‘other organizations’ under Article XXIII	No clear definition of NGO – has ‘public or private agencies, establishments or organizations’ under Article IV(1)

CHARACTERISTIC	CAMLR CONVENTION	WHALING CONVENTION
<b>Other aspects of the Conventions</b>		
<b>Other Commission bodies</b>	<i>Ad hoc</i> working groups, standing committees on finance and administration, and implementation and compliance	<i>Ad hoc</i> working groups; Bureau; Committees for ASW, finance and administration; WKM; conservation.
<b>Intersessional participation</b>	NGOs are limited to attendance at workshops that inform the work of the Commission but do not form the work of the Commission; indicative of standing aligned to limited observer rights	NGOs can attend both workshops and working groups and other bodies that form the work of the Commission, indicative of standing aligned to broad observer rights
<b>Relationship to other Conventions</b>	Is part of the Antarctic Treaty System and subject to the object and purpose of the <i>Antarctic Treaty</i> ; references the Charter of the United Nations	References prior whaling Agreements and Protocols as significant to the work of the Commission

*Table 3.3 Summary table of the comparative and comparable characteristics of the Whaling and CAMLR Conventions and Commission*

## 3.6 Reservations

### 3.6.1 CAMLR Convention

Consensus voting in the CAMLR Commission limits the need for reservations to decisions on conservation measures.<sup>294</sup> If a Member of the Commission invokes the reservation procedure, any Member of the Commission may request a meeting of the Commission to review the conservation measure. If this course of action is taken, any Member may declare they are not bound by the conservation measure at the meeting, or within thirty days following the meeting.<sup>295</sup> Yet prior to any of these actions being taken, consensus on a conservation measure must have been reached, so it perhaps unsurprising that in the history of the CAMLR Commission the reservation procedures has generated no contentious reservations.<sup>296</sup>

### 3.6.2 Whaling Convention

By contrast, in the *Whaling Convention*, a Contracting Government can lodge an objection to a *Schedule* amendment if the notification is made within ninety days of the amendment.<sup>297</sup> Japan, Norway, Peru and Russia have lodged several objections, particularly in relation to the commercial moratorium,<sup>298</sup> and the *Schedule* amendment banning the use of cold grenade harpoons.<sup>299</sup> The capacity to lodge an objection to the text of the Convention's *Schedule* has created fractures in the Whaling Commission that

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<sup>294</sup> *CAMLR Convention*, Article IX.6(c).

<sup>295</sup> *CAMLR Convention*, Article IX.6(d).

<sup>296</sup> *CCAMLR-XVI Meeting of 27 October – 7 November 1997*, 'Report of the Sixteenth Meeting of the Commission' (Hobart, Australia, adopted 7 November 1997) [8.14]; *CCAMLR-XXXII Meeting of 23 October – 1 November, 2013*, 'Report of the Thirty-Second Meeting of the Commission' (Hobart, Australia, adopted 1 November, 2013) [7.61]; *CCAMLR-XXXIII Meeting of 20 – 31 October, 2014*, 'Report of the Thirty-Third Meeting of the Commission' (Hobart, Australia, adopted 31 October, 2014) [7.4].

<sup>297</sup> *Whaling Convention*, Article V.3.

<sup>298</sup> *Whaling Convention Schedule*, section 10(e). Iceland's accession to the *Whaling Convention* was made with a reservation to section 10(e).

<sup>299</sup> *Whaling Convention Schedule*, III Capture sections 6 and 7(b).

are not evident in the CAMLR Commission.<sup>300</sup> It is important to note that reservations to the commercial whaling moratorium contained in 10(e) of the Schedule, while politically controversial are nonetheless legitimate under both the Convention Articles and the Articles of interpretation in the *Vienna Convention*.<sup>301</sup>

### 3.6.3 Discussion

The reservation provisions in the *CAMLR and Whaling Conventions* have different uses, time frames and results. In the CAMLR Commission, reservations are made when there is a domestic inability to meet the agreed standard because of an unforeseen intervening factor; reservations are made with a view to withdrawing them once domestic circumstances permit the member state to comply. These reservations are made infrequently and are withdrawn when compliance becomes possible. In the Whaling Commission, reservations are made because of a lack of political will to comply with amendments to the Schedule, and so results in long standing variation in the legal obligations of Contracting Governments. The use of the reservation is thus reflective of the voting structure – the CAMLR Commission decides and acts in consensus, while the Whaling Commission decides in the majority and acts in the majority, permitting minority dissent.

## 3.7 Conclusion

This chapter provided an overview of the legal frameworks of the *Whaling* and *CAMLR Conventions*. Aspects of the Conventions considered were the geographical and species jurisdiction of the Commissions, the difference in membership and voting structures, the ability to lodge a reservation to the treaty, and the substantive regulatory powers.

The nature of the jurisdiction – geographical under the *CAMLR Convention*, and species-based under the *Whaling Convention*, has some ramifications for the exercise of regulatory powers, due to the narrow focus inherent in a species-based jurisdiction, but also in the broad terms of the *Whaling Convention* itself. These broad terms accentuate

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<sup>300</sup> The objection of Iceland to the commercial whaling moratorium in the *Schedule* was itself the subject of an objection lodged by Argentina, Australia, Brazil, Chile, Finland, France, Germany, Italy, Mexico, Monaco, the Netherlands, New Zealand, Peru, San Marion, Spain, Sweden, the UK and the USA: *Whaling Convention Schedule*, 6, footnotes.

<sup>301</sup> Gillespie, above n 263, 387-389; Fitzmaurice, above n 183.

the political nature of the Commission as a forum. Coupled with the two-thirds majority voting system for substantive regulatory decisions, NGOs in the observer position have significant scope to exert influence, both domestically and within the forum of the Whaling Commission itself. This stands in contrast to the position of the CAMLR Commission, which operates under a geographical jurisdiction, relying on clear insistence on there being a scientific basis for deliberations and consensus decision-making. While the broad jurisdiction under the *CAMLR Convention* enables wide-ranging contributions from NGO observers, the clear terms of Articles II and IX require that NGO contributions fall within well-defined expectations.

The differences engendered by majority versus consensus decision-making, coupled with membership prerequisites and obligations are significant. Where the *CAMLR Convention* requires acceding nations to be involved in the Antarctic in a scientific or commercial capacity, the *Whaling Convention* requires only that a state notify the depositary state of the intention to ratify the convention.<sup>302</sup> The closed membership circle of the CAMLR Commission, with consensus decision-making creates a forum where NGO contributions must meet not just the strict criteria of the Convention, but also the expectations of all states, all of which have vested interests in the Antarctic, and the capacity to veto the observer status of the NGO. The Whaling Commission is made up largely of non-whaling countries, its membership fluctuates greatly over time, and with a two-thirds majority, NGOs are free to present contributions to the Commission more contentious and political than those of CCAMLR-based observer NGOs. The broad terms of the *Whaling Convention* can be interpreted so multitudinously, if so wished, that with the addition of the voting and membership aspects, NGO contributions can draw wide of the mark and receive little or no reproof.

In terms of reservations, the significant capacity of states in the Whaling Commission to lodge a reservation contributes to the disunity inspired by a two-thirds majority voting structure, and open membership. Without clear consensus-based acceptance by the Commission of the decisions of the Commission, the capacity for NGOs to rely on discord is increased – the reservation itself can be seen as an attack point, through which to push an agenda. Compared to the CAMLR Commission, where reservations are

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<sup>302</sup> Scott above n 225, 600 noting that this has caused issues of hegemonic domination of the Whaling Commission agenda.

infrequent due to the nature of the voting system, the use of the reservation capacity under Article VI in the Whaling Commission, is contentious, and seeds discord to which NGO observer contribute.

The clarity with which a convention ties its object and purpose to its regulatory mandate also supports functionality, and safeguards from pressure exerted by NGOs and/or non-parties to the convention. The *CAMLR and Whaling Conventions* provide similar regulatory powers in relation to setting season, area, size and quantity of catch. However, the *CAMLR Convention* creates clear ties between the decisions of the Commission and the Scientific Committee, as well as between the object and purpose of the Convention and the decision-making function of the Commission. By contrast, the *Whaling Convention* has no clear relationship between the decisions of the Commission and Scientific Committee, while the ties between the object and purpose and regulatory powers are non-specific.

While some of the chaos of the Whaling Commission has been hinted at in discussing the jurisdictional, voting, membership and reservation function of the Convention, the absence of clear connections between scientific advice and evidence, and the substantive regulatory functions of the Commission contribute to the discord. This chapter has provided both the context of the Whaling and CAMLR Commissions, in terms of jurisdiction and function, and also an object and purpose interpretation of the non-state actor Articles as a reference point for analysis of the observer position and the roles that attend upon that status.

## Chapter 4: Defining NGOs and their behaviours in international law and the Commissions

### 4.1 Introduction

Chapter Two presented the methods of treaty interpretation and object and purpose construction in international law. Chapter Three applied those methods to the *CAMLR Convention* and *Whaling Convention*, construing the object and purpose of each, and outlining the jurisdiction of the two Commissions under their respective conventions. This chapter engages with the NGO as a type of non-state actor. This has two aspects. The first aspect is what qualities define an NGO? This question is approached by looking at literature, international definitions of NGO, and finally at what makes NGOs unique from other non-state actors. The second aspect of this chapter involves an object and purpose analysis of the observer position in the CAMLR Commission and Whaling Commission. The observer position is available to NGOs for formal engagement. This part of the chapter looks at the Conventions, as well as *Rules of Procedure* and *Rules of Debate* to understand the nature of the observer position.

This chapter considers the literature on NGOs in international law and explores the roles of NGOs in the Whaling and CAMLR Commissions in relation to the role of observer, as the dominant means of NGO engagement with the Commissions. This chapter defines the NGO as a distinct legal entity. It proposes distinguishing among NGOs on the basis of the purpose of the organization. This chapter also looks at current international law scholarship to explore how the term 'NGO' is used in international bodies to define non-state actors. The first section looks at some definitions in international instruments and literature on NGOs. It identifies a lack of clarity and certainty in what constitutes an NGO as distinct from what validates an applicant organization for approval to engage with intergovernmental organizations (IGOs). Section two provides a simple definition of 'non-governmental organization' that is transferable across all types of NGOs and IGOs, particularly treaty bodies, and avoids

many of the problems identified in section one.<sup>303</sup> The third section considers the NGOs in the Whaling and CAMLR Commissions according to the purpose of the NGO, and categorises the relevant NGO observers into four types: industrial, environmental, scientific and hybrid NGOs. These four types were not derived from literature but from observation of the NGOs in the two organizations<sup>304</sup>

This chapter lays the foundations for discussion of the roles available to NGOs as observers and otherwise under the *CAMLR* and *Whaling Conventions*. It provides the foundation for an object and purpose analysis of these roles. This chapter concludes that the identity of the NGO must be grounded in its legal identity. The purpose of an NGO provides nuance amongst NGO actors, allowing for an analysis that distinguishes between NGOs on the basis of purpose. This facilitates a discussion based on the specifics of NGOs in the case studies rather than on a generalised overview of non-state actors as an indistinct caste.

## 4.2 The challenge of defining “NGOs”

NGOs are a type of non-state actor. A wide range of non-state actors – corporations, private military companies,<sup>305</sup> terrorist organizations, universities, research bodies, pseudo-states, individuals, private contractors and others are significant participants

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<sup>303</sup> Karima Bennoune, ‘Productive tensions: women’s rights NGOs, the “mainstream” human rights movement, and international lawmaking’ in Cecilia M. Bailliet, *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (Cambridge University Press, 2012) 125, 127-128.

<sup>304</sup> There is a fifth category – cultural NGO, which is not relevant to the Southern Ocean.

<sup>305</sup> Laura A Dickinson, ‘Privatizing War: Private Military and Security Companies Under Public International Law’ (2014) 108 *American Journal of International Law* 589; Won Kidane, ‘Status of Private Military Contractors under International Humanitarian Law’ (2010) 38(3) *Denver Journal of International Law and Policy* 361; Joseph C Hansen, ‘Rethinking the regulation of private military and security companies under international humanitarian law’ (2012) 35 *Fordham International Law Journal* 698; Francesco Francioni and Natalino Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, 2011); Emanuela-Chiara Gillard, ‘Business goes to war: private military/security companies and international humanitarian law’ (2006) 88(863) *International Review of the Red Cross* 525.



across international law.<sup>306</sup> While an object and purpose analysis can be applied to any actor in a treaty body, the restriction in this thesis to NGOs is founded on the proliferation of NGOs in intergovernmental bodies.<sup>307</sup>

NGOs are the most consistent presence across a broad range of international law, including international humanitarian, and international trade law.<sup>308</sup> NGOs can engage, reflect and influence public opinion across geographical and population limitations that hinder states in their influence simply because they represent ideas, or ideals, rather than a geographically defined nation state.<sup>309</sup> NGO behaviours are “sovereignty-free”,<sup>310</sup> in terms of obligations and rights. Where NGOs engage in transnational activities, particularly, but not only, where they extend beyond accepted roles such as networking and coalition-building, this “sovereignty-free” status can challenge the effective

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<sup>306</sup> Cedric Ryngaert, ‘Non-State Actors: Carving out a Space in a State-Centred International Legal System’ (2016) 63(2) *Netherlands International Law Review* 183; D Robert DeChaine, ‘Humanitarian Space and the Social Imaginary: Médecins sans frontieres/Doctors Without Borders and the Rhetoric of Global Community’ (2002) 26(4) *Journal of Communication Inquiry* 354.

<sup>307</sup> Nowrot, above n 22, 579-580; Charnovitz, ‘Nongovernmental organizations’, above n 272; Kal Raustiala, ‘States, NGOs, and International Environmental Institutions’ (1997) 41(4) *International Studies Quarterly* 719, 719; Peter Willetts, ‘From Stockholm to Rio and beyond’ above n 28, 57.

<sup>308</sup> Mark Fathi Massoud, ‘Work Rules: How International NGOs Build Law in War-Torn Societies’ (2015) 49(2) *Law & Society Review* 333; Daniela Irrera, ‘NGOs and humanitarian action’ in Daniela Irrera, *NGOs, crisis management and conflict resolution* (Edward Elgar, 2013) 44-67; Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Brill, 2014); Russy D Sumariwalla, ‘Making a Difference: The role of international NGOs in the evolution of international human rights and humanitarian law (HRHL)’ (2011) 19 *Williamette Journal of International Law & Dispute Resolution* 287; Daniel C Esty, ‘Non-governmental organizations at the World Trade Organization: Cooperation, Competition or Exclusion’ (1998) 1 *Journal of International Economic Law* 123; Gunnar Sjöstedt, ‘NGOs in WTO Talks: Patterns of Performance and What They Mean’ (2011) 17 *International Negotiation* 91.

<sup>309</sup> Hein-Anton van der Heijden, ‘Globalization, Environmental Movements, and International Political Opportunity Structures’ (2006) 19(1) *Organization & Environment* 28; Thomas G Weiss and Leon Gordenker, *NGOs, the UN, & Global Governance* (Lynne Rienner, 1996); Liza Danielle Fallon, *The Role of State and Non-state Actors in the Management of the Patagonian Toothfish (Dissostichus eleginoides)* (Doctoral thesis, University of Tasmania, 2007).

<sup>310</sup> Fallon, above n 35, 181, 186.

operation of treaty bodies.<sup>311</sup> Sovereignty-free activity on the part of NGOs can be moderated by treaty bodies, in order to support effective operations, by analysis of NGO behaviours through an object and purpose framework, and by normalising engagement rules and procedures of NGOs in line with the convention under which their engagement is prescribed.

There is a category of prominent, visible non-state actors in international law that informs the concept of NGO.<sup>312</sup> Questions of organizational legitimacy and accountability of these actors in IGOs have become the focus of commentary, and increasingly, criticism.<sup>313</sup> Pervading such commentary is the fundamental issue of defining NGO: what type of organizations are the focus of questions of accountability? For a focused analysis, it is necessary to define the unique quality of the NGO as a non-state actor distinct from both other non-state actors and from states. It is also necessary to refrain from a simply negative definition of NGO.

Peter Willetts notes the difficulties associated with providing a clear definition of NGO in light of the diverse literature and practice,<sup>314</sup> particularly with numerous definitions of NGO in international law. For example, the definition decided upon by the Panel of Eminent Persons on United Nations–Civil Society Relations (Cardoso Panel) defines NGO as ‘shorthand for public-benefit NGOs – a type of civil society organization that is formally constituted to provide benefit to the general public or world at large’<sup>315</sup> However, public benefit is a value judgement and difficult to objectively define. Another

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<sup>311</sup> Charnovitz, ‘Two Centuries’, above n 30, 280-282; Sebastian Oberthür et al, *Participation of Non-Governmental Organizations in International Environmental Governance: Legal Basis and Practical Experience Final Report*, June 2002 (ecologic) 53-70.

<sup>312</sup> Charnovitz, ‘Nongovernmental organizations’, above n 30.

<sup>313</sup> Lutz Schrader and Tobias Denskus, ‘Introduction: Transnational NGOs and Legitimacy, Accountability, Representation’ in Jens Steffek and Kristina Hahn (eds), *Evaluating Transnational NGOs* (Palgrave Macmillan, 2010) 1, 2; Charnovitz, ‘Nongovernmental organizations’, above n 30.

<sup>314</sup> Willetts, ‘Stockholm to Rio’, above n 28, 8-9.

<sup>315</sup> Fernando Henrique Cardoso, *We the peoples: civil society, the United Nations and global governance; Report of the Panel of Eminent Persons on United Nations-Civil Society Relations*, UNGAOR, 58<sup>th</sup> sess, Agenda Item 59, UN Doc A/58/817 (11 June 2004) 13.

example is the Organization for Economic Co-operation and Development (OECD), which defines NGOs as 'private non-profit-making agencies, including co-operative societies and trade unions'.<sup>316</sup> The Cardoso definition relies on value judgement, and the OECD definition includes societies and trade unions, which have their own domestic legal identities. Fundamentally, these definitions make use of the term NGO as a general reference for non-state actors, rather than seeking to truly define a class of actor.

Definitions of NGO have been provided by a number of other reputable international sources, including the Council of Europe,<sup>317</sup> the *United Nations Framework Convention on Climate Change (UNFCCC)*,<sup>318</sup> the *United Nations Convention on Biological Diversity (CBD)*,<sup>319</sup> the Yearbook of International Organizations, and the United Nations Economic and Social Council (ECOSOC).<sup>320</sup> None of these definitions are consistent, and all are relative to the organization defining the group. The definitions depend on the application process for an observer invitation, which depends on the NGO being involved in activities within the sphere of a treaty body's jurisdiction.

An example of this relativity of definition is found in the definition of international NGO. An international NGO under the *European Convention on the Recognition of Legal Personality of International Non-Governmental Organizations* requires four characteristics in an international NGO:

- a) have a non-profit-making aim of international utility;
- b) have been established by an instrument governed by the internal law of a Party;
- c) carry on their activities with effect in at least two States; and

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<sup>316</sup> Willetts, 'Stockholm to Rio', above n 28, 8-9.

<sup>317</sup> *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, opened for signature 24 April 1986, ETS 124 (entered into force 1<sup>st</sup> January 1991).

<sup>318</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, [1994] ATS 2; (1992) 31 ILM 849 (entered into force 21 March 1994)

<sup>319</sup> *1992 Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS 32; 1769 UNTS 79 (1992) 31 ILM 818 (entered into force 29 December 1993)

<sup>320</sup> Oberthür et al, above n 311, 26-39 provides an overview of definitions of NGOs from a broad range of organizations, demonstrating the varying definitions and lack of consistency.

- d) have their statutory office in the territory of a Party and the central management and control in the territory of that Party or another Party.<sup>321</sup>

Omitting the requirement for activity in at least two states, which defines the international element of NGO, leaves three characteristics of an NGO; yet none requires NGOs to identify as possessing a significant membership outside of government, and so does not appear to need NGOs to, in fact, be non-government. The non-profit-making aim may also clash with statutory incorporation, if the statutory incorporation does not have a non-profit, tax-exempt or charitable legal status. If the statutory requirement is simply to have an office in the territory of a Party to a treaty, and carry out a non-profit-making aim, then a corporation with a statutory office that engages with a treaty body for a non-profit purpose can be defined as an NGO.

The question of international utility in the definition is of limited relevance in defining an NGO as it is a relative assessment of purpose that is less about the legal form of the organization and more about recognition of value to an IGO. This is not *defining*, although it is important for NGOs engaging with IGOs to demonstrate their context-specific international utility to the organization.

A 21<sup>st</sup> century example of the definition of NGO is under the *UNFCCC*, where the definition is contained in the standard admission policy;<sup>322</sup> the Convention itself does not define NGOs.<sup>323</sup> The requirements for admission as an NGO observer in the *UNFCCC* are clear and objective. An NGO must have: non-profit or tax-exempt status; be legally incorporated/registered/established in a jurisdiction; be properly financially governed, demonstrate transparency of funding; and have affiliations with other NGOs. However, the admission requirements also make room for universities, indicating that the definition of NGO includes universities, thus precluding sufficient independent

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<sup>321</sup> *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, opened for signature 24 April 1986, ETS 124 (entered into force 1<sup>st</sup> January 1991) Art 1.

<sup>322</sup> United Nations Climate Change Secretariat, *Standard admission process for non-governmental organizations (NGOs)* (no date) <https://oas.unfccc.int/oas>.

<sup>323</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, [1994] ATS 2; (1992) 31 ILM 849 (entered into force 21 March 1994), Article IV(1)(i); Article 7(2)(l).

definition of NGO, as a university is a distinct entity in itself. Aside from this and the NGO affiliation characteristics, the legal elements of the definition are clear – incorporation and transparency are key aspects of NGOs.

The United Nations Economic and Social Council (ECOSOC) has a Standing Committee on Non-Governmental Organizations, which coordinates participation of NGOs in United Nations conferences and meetings.<sup>324</sup> ECOSOC Resolution 1996/31 sets out the criteria for admission to consultative status, none of which includes legal incorporation as a not-for profit or tax-exempt body. The focus is on purpose, activity, governance and membership.<sup>325</sup> The emphasis within these criteria is on purpose – a relational definition that bears on the value of the NGO to the work of the United Nations, rather than on the characteristics of the NGO itself. This definition is inadequate as an independent legal definition of an NGO.

The treaty body under the *Convention on Biodiversity* (CBD) has significant interaction with NGOs,<sup>326</sup> and the practice of the CBD is an interesting example of the confusion around the term NGO. The reference to NGOs in the *CBD* text is restricted to the Preamble and refers only to ‘the non-governmental sector’:

*Stressing the importance of, and the need to promote, international, regional and global cooperation among States and intergovernmental organizations and the non-governmental sector for the conservation of biological diversity and the sustainable use of its components;*

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<sup>324</sup> United Nations Economic and Social Council, *Consultative relationship between the United Nations and non-governmental organizations*, 49<sup>th</sup> plenary meeting of the Economic and Social Council, UN Doc Resolution 1996/31 (25 August 1996).

<sup>325</sup> ECOSOC Resolution 1996/31, [44].

<sup>326</sup> As does the *CITES* Commission under the *Convention on International Trade in Endangered Species* (CITES). Both Conventions have connections to the *CAMLR and Whaling Conventions*: Duncan E J Currie (submitted by Austria? Australia – isn’t he one of ours?), *Ecosystem-Based Management in Multilateral Environmental Agreements: Progress towards Adopting the Ecosystem Approach in the International Management of Living Marine Resources* IWC/59/18; Antarctic and Southern Ocean Coalition (ASOC), *Position statement on Listing Toothfish under Appendix II of the Commission on International Trade in Endangered Species (CITES)* CCAMLR-XXI/BG/29.

The practice of the *CBD* indicates strong engagement with ‘civil society’: A newsletter published by the *CBD* Secretariat is directed at civil society organization engagement.<sup>327</sup> The expectations of the *CBD* for admission of *all observers* to meetings of the Conference of the Parties (COP) are, firstly, relational: the organization must have qualifications relating to conservation and biological diversity. The requirements then include the organization possessing a website, documentation demonstrating its legal legitimacy in a domestic jurisdiction, as well as internal governance documents.<sup>328</sup> As with the *UNFCCC*, the legal legitimacy and governance requirements are clear in defining NGO, but for the *CBD*, it is clear that any legal incorporation is acceptable. The broad interpretation of NGO by the *CBD* and its associated bodies is reinforced by a message issued by the *CBD* Secretariat in which the Executive Secretary describes ‘non-governmental organizations, including environmental not-for-profit organizations’. This broad reference to NGOs is tantamount to the nomenclature ‘civil society’<sup>329</sup> as a catch all for any organization that is not either a state or an IGO.

While treaty body definitions lack consistency and reflect a utilitarian use of the term ‘NGO’ to encompass many and sundry actors, academic literature is also not an adequate guide to defining NGO. Willetts’ discussion of the high variance among definitions of NGOs highlights a number of characteristics that are widespread through various definitions but are not ubiquitous. Some traits include: NGOs are for public benefit or cooperative; they act for others, or on behalf of others; they are not for profit; and they are independent.<sup>330</sup> The definition Willetts gives, however, is entirely negative: ‘*not* direct agents of individuals or governments, *not* pursuing criminal activities, *not* engaged in violent activities, and *not* primarily established for profit-making purposes’

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<sup>327</sup> None, *Non-Governmental Organizations* (NGOs) (no date) Convention on Biological Diversity <https://www.cbd.int/ngo/>.

<sup>328</sup> None, *Meetings* (no date) Convention on Biological Diversity <https://www.cbd.int/ngo/meetings.shtml> Rule 7.1.

<sup>329</sup> Dr Ahmed Djoghlaif, *Message of Dr Ahmed Djoghlaif, the New Executive Secretary of the Convention on Biological Diversity, to the Environmental NGOs of our Planet* (22 May 2006) *Convention on Biological Diversity*, <https://www.cbd.int/doc/speech/2006/sp-2006-02-21-ngo-en.pdf>.

<sup>330</sup> Willetts, ‘Stockholm to Rio’, above n 28, 8-9.

[emphasis added].<sup>331</sup> The only positive aspect of Willetts' definition is that an 'NGO is any organization that has, or is eligible to have, consultative status with the Economic and Social Council of the United Nations.'<sup>332</sup> This is, again, a relative definition and does not independently define NGOs – it defines an organization's value to an IGO.

The works of Willetts, Betsill and Correll, and Oberthür, identify three common traits for the definition of NGO in the documents of IGOs; one *positive* trait and two *negative* traits.<sup>333</sup> The positive trait is that the NGO must demonstrate expertise or interest in the subject matter of the organization they wish to address or meetings attend; the negative traits are that the NGO is *not* established by intergovernmental agreement and it must *not* be part of a government and so is free to express its views unhindered by government.<sup>334</sup> This definition is dependent on the relationship of an organization with a state-based institution or organization. Under this definition, there is no reference to the legal status of the organization within domestic jurisdictions, and truly distinguishing features are not present – corporations, trade unions and other bodies could fall within this definition. To qualify as an NGO under such a broad definition an organization must simply *not be governmental* and bring an independent expertise or interest to an international organization.<sup>335</sup>

A definition of NGO should avoid the lack of clarity that comes from such terms as 'civil society',<sup>336</sup> which gives too broad a classification, including any organization that isn't a state or state-based. As this review has demonstrated, IGOs and academic literature have yet to address a definition of "NGO" as an entity rather than a nomenclature. To overcome the limitations of a utilitarian use of the term "NGO" and give the term some

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<sup>331</sup> Willetts, 'Stockholm to Rio', above n 28, 31.

<sup>332</sup> Willetts, 'Stockholm to Rio', above n 28, 30.

<sup>333</sup> Michele M Betsill and Elisabeth Corell, 'Introduction to NGO Diplomacy' in Michele M Betsill and Elisabeth Corell, *NGO Diplomacy* (The MIT Press, 2008) 1, 4; Willetts, above n 29, 31, Oberthür et al, above n 291, 1-2.

<sup>334</sup> Betsill and Corell, above n 333; Willetts, 'Stockholm to Rio', above n 28, 31, Oberthür et al, above n 311, 1-2.

<sup>335</sup> Betsill and Corell, above n 333.

<sup>336</sup> Jan Aart Scholte 'Civil Society and the Legitimation of Global Governance' (2007) 3(3) *Journal of Civil Society* 305, 311; Willetts, 'The Cardoso Report', above n 15.

real meaning, the definition here has removed “NGO” from dependency on an NGO’s relationship with a treaty body and focuses on the core legal composition of NGOs as definitive. The definition below uses concrete legal identity as the basis for defining “NGO”, and the purpose of the organization as a distinguishing rather than defining characteristic. This overcomes the limitations of the many and disparate definitions of ‘NGO’ and ‘civil society’ and focuses specifically on the legal identity of prominent pressure groups acting in international law.

### 4.3 A definition of NGO

The previous section critiqued the issues of definition of NGO in international law and academic literature. This section provides a simple definition of NGO that is transferable to any international law context to distinguish NGOs from all other types of non-state actor. This definition is derived from common qualities noted in IGOs and academic literature, particularly the work of Anna-Karin Lindblom.<sup>337</sup> This definition removes relational characteristics, and refers to the fundamental requirement for an NGO to have a specific legal identity in one or more domestic jurisdictions. According to Lindblom, an NGO has four fundamental defining characteristics:<sup>338</sup>

1. Possessing legal personality as a not-for-profit/ tax exempt organization;
2. Freely created by private initiative (i.e. *non-government*);<sup>339</sup>
3. Composed of voluntary and primarily private membership; and
4. Having an organizational purpose or purposes.

The fourth characteristic of purpose distinguishes the NGO from universities, research institutes, churches and trade unions, just as not-for-profit distinguishes NGOs from corporations. but it also distinguishes between NGOs. The fundamental purpose of universities, research institutions, trade unions and churches is implicit in the

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<sup>337</sup> Anna-Karin Lindblom, *Non-Governmental Organizations in International Law* (CUP, 2009).

<sup>338</sup> Lindblom, above n 337, 53.

<sup>339</sup> Charnovitz, ‘Nongovernmental Organizations’, above n 30, 350: thus being ‘non-governmental’.



organization. Distinct from these organizations, NGOs must have a purpose, but that purpose is unique to each NGO.

#### 4.3.1 Legal Status

To be an NGO, an organization must be incorporated within one or more domestic jurisdictions as a not for profit group. There is no requirement that an NGO in either the Whaling or CAMLR Commissions be an international NGO. To be an international NGO, as prescribed by the *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, an NGO must carry on activities in at least two States. This is simple enough, and a relevant characteristic necessary for classification as an international NGO (or INGO).

The primary states that engage with NGOs are Western democracies, such as the United States, Australia, the United Kingdom, Canada, and various states within the European Union.<sup>340</sup> These domestic jurisdictions have legislation for non-profit incorporation. In the United States, to be an NGO requires being a 501(c)(3) organization.<sup>341</sup> In Australia, there is the federal *Australian Charities and Not-for-Profits Commission Act 2012*; and the Tasmanian *Associations Incorporation Act 1964*, and the Western Australian *Associations Incorporation Act 1987*, amongst other state-based legislation. In the United Kingdom environmental NGOs, such as the Environmental Investigation Agency (EIA) are registered as charities, and identify as NGOs.<sup>342</sup> In Switzerland, the home of the IUCN and the Red Cross, incorporation for legal personality requires compliance with the *Swiss Civil Code* Articles 80–89. International NGOs have automatic legal personality within Switzerland.<sup>343</sup>

Non-western nations also have legislation allowing for the establishment of non-profit status organizations. South Korea has two primary legal bases for NGOs – foundations and associations. Associations are the most commonly used legal basis for NGOs. Groups wishing to become legally recognised associations must apply through a registration

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<sup>340</sup> Willetts, above n 30.

<sup>341</sup> *US Code*, 1947, section 501(c)(3).

<sup>342</sup> *UK Companies Act*, 2006, section 5.

<sup>343</sup> *210 Swiss Civil Code*, 1907, Chapter III, Articles 80-89.

procedure with the ministry relevant to the purpose of the association. When registered, the association has legal capacity.<sup>344</sup> The legal form of a foundation is popular with industry and government interests, but also increasingly with individuals. Foundations must be not for profit and tend to be 'so well organized and funded that in certain fields they play a significant role.'<sup>345</sup> To this end, the distinction between industry and other NGO types may be indicated within the domestic sphere of South Korea in the type of legal form chosen.

While the Russian Federation does have legislation that allows for the incorporation of non-profit entities, it invited international and domestic criticism with its introduction in 2012 of restrictive laws regarding 'Foreign Agents' and NGOs operating within Russia.<sup>346</sup> The means of applying for legal status in the Russian Federation are unclear, however academic work indicates that there are three recognised types of civil society association within the Russian federation: '(1) associations with close financial and political links to the state; (2) western financed organizations; and (3) domestic self-financed movements.'<sup>347</sup>

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<sup>344</sup> Kim, Inchoon and Hwang, Changsoon, *Defining the Nonprofit Sector: South Korea* (Working Papers of the John Hopkins Comparative Nonprofit Sector Project, No 41, 2002) 9-10.

<sup>345</sup> Inchoon and Hwang, *Defining the Nonprofit Sector: South Korea* (Working Papers of the John Hopkins Comparative Nonprofit Sector Project, No 41, 2002) 10.

<sup>346</sup> Freedom House, *Factsheet: Russia's NGO Laws*, Freedom House (no date) [https://freedomhouse.org/sites/default/files/Fact%20Sheet 0.pdf](https://freedomhouse.org/sites/default/files/Fact%20Sheet%200.pdf); International Work Group for Indigenous Affairs and Institute for Ecology and Action Anthropology, *Parallel information: Civil and political rights of indigenous minority peoples of the North, Siberia and the Far East of the Russian Federation*, CCPR 113 Session (16 March – 02 April 2015) 7<sup>th</sup> periodic reports of the Russian Federation CCPR/C/RUS/7, 13 [26]; YV Ivashchecnko, *Soviet whaling: past history and present impacts* (Doctoral Thesis, University of Southern Cross University, Lismore, NSW, 2013); ATMMHC, *Association of Traditional Marine Mammal Hunters of Chukotka*, ATMMHC (no date) <http://ansipra.npolar.no/english/items/ATMMHC.html>; Galina Diatchkova, 'Chukotka's Indigenous Peoples: Issues and Prospects for Development' in Natalia Loukacheva (ed), *Polar Law Textbook* (TemaNord, 2010) 11.4.

<sup>347</sup> Elena Chebankova, 'State-sponsored civic associations in Russia: systemic integration or the 'war of position'? (2012) 28(4) *East European Politics* 390 – 408, 391.

#### 4.3.2 Private initiative

Private initiative is a requirement of being an NGO that bears on the ‘non-government’ aspect of the NGO identity. It ties closely to the incorporation of the organization as non-commercial, not-for-profit, or tax-exempt aspects of incorporation. Private initiative may nonetheless be cooperative with government or government entities.

The separation between public and private is a qualifying characteristic – government cannot be the sole motivating actor in the development of an organization that will be termed an NGO. While states or government departments may participate in the establishment of the organization, the organizational documents must express independence from individual governments. Even in the early phases of establishing an NGO, indications of government cooperation with the organization is not fatal. Where several governments, in collaboration with private organizations create an organization that has independent purposes from any member government, it is neither an intergovernmental organization (IGO) or an NGO – it is a hybrid NGO, because of its membership composition.

#### 4.3.3 Membership

Membership of an NGO must be voluntary. However, another aspect of membership to note is that government or government body membership of an NGO is not fatal to the identity of an NGO.<sup>348</sup> Membership can be used as a distinguishing factor, much like with purpose. In the Whaling and CAMLR Commissions it is possible to distinguish between the types of organizations that seek observer status or that are present on national delegations, and it is possible to distinguish between NGOs on the basis of purpose, as well as membership – although, purpose is the primary distinguishing factor. There are four categories of NGO observed in the Whaling and CAMLR Commissions: environmental NGOs, with subclasses of scientific and animal welfare oriented NGOs; industry NGOs, the purpose of which is to represent industry interests, and whose membership is restricted to for-profit companies and their representatives; cultural NGOs, the purpose of which is the represent the interests of particular cultural groups, and whose membership is restricted to individuals and organizations associated with the cultural group represented; and hybrid NGOs, an NGO type that may fit any of

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<sup>348</sup> Charnovitz, ‘Nongovernmental Organizations’, above n 30, 351-352.

these categories but whose membership includes states. Hybrid NGOs are worth noting because the most prominent of such NGOs, the International Union for the Conservation of Nature (IUCN), has special status at both the Whaling and CAMLR Commissions because of its membership. A second hybrid NGO, the international Wildlife Management Consortium World Conservation Trust (IWMC WCT) is less prominent but fits the definition of a hybrid NGO due to its membership.<sup>349</sup>

#### 4.3.4 Purpose – distinguishing NGOs amongst NGOs

The purpose of an NGO distinguishes one from another. There are five broad types of NGO within the Whaling and CAMLR Commissions: environmental, scientific, cultural, hybrid, and industrial NGOs. These terms were developed for this thesis to describe the NGOs observed in the two Commissions. Environmental, scientific, cultural and industrial NGOs are defined by purpose. Hybrid NGOs are defined by inclusion of government or state membership in the NGO. Hybrid NGOs transcend the public/private divide through cooperative initiatives between private and government interests. Hybrid NGOs are initiated by private citizens, maintain independent purpose, and are incorporated as an NGO. While the interests of the NGO and government may coincide, the hybrid NGO is not a ‘puppet’ of government.

The purpose of an NGO is useful in distinguishing among the NGOs involved in the two commissions. It is a means of grouping NGOs according to their general type as well as facilitating comparative analysis of these groups. The contributions made by various NGOs in their observer roles are to the subject of primary analysis, while the organization purpose and type facilitates the secondary analysis of how different NGO types behave within the commissions. This means that purpose and therefore type is important in providing a deeper analysis of object and purpose adherence among NGOs.

#### 4.3.5 Benefits of a legal definition of NGO

There are a number of benefits to this definition. First, a simple definition allows for the specific purpose/s of an NGO to be a distinguishing feature among *types* of NGOs rather

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<sup>349</sup> See Appendix 5.

than purpose as defining of an organization being an NGO.<sup>350</sup> Using the purpose of an NGO as a defining trait has proved problematic because of the diversity of positions and goals of NGO actors.<sup>351</sup> Second, this definition can be used to distinguish between NGOs on the basis of membership. Membership can be a distinguishing factor where membership of the NGO by states or government organs is present. Where an NGO has government membership it nonetheless remains an NGO if it maintains an independence of purpose from the government members and satisfies all other criteria.

Third, a legal definition of NGO steers away from the lack of clarity we find in the definition of civil society,<sup>352</sup> a broad and inclusive category that can include NGOs but should not be a synonym for NGO. A legal definition gives a specific legal personality – this is significant as the ‘mere fact of possessing rights and obligations based on international law is not sufficient to claim international legal personality.’<sup>353</sup> Having rights and obligations within a treaty body is not enough to define ‘NGO’. An NGO should be defined by its domestic legal personality not by its relationship to an organization.<sup>354</sup> Fourthly, and finally, the legal definition gives specificity to NGOs as a group and allows NGOs themselves to be separated out and the variety of types of NGO identified. This is

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<sup>350</sup> Willetts, ‘From Stockholm to Rio’, above n 28, rejecting moral value of purpose as defining, 12.

<sup>351</sup> Lutz Schrader and Tobias Denskus, ‘Introduction: Transnational NGOs and Legitimacy, Accountability, Representation’ in Steffek, Jens and Kristina Hahn (eds), *Evaluating Transnational NGOs* (Palgrave Macmillan, 2010) 1, 2; Bennoune, above n 283, 125.

<sup>352</sup> Scholte, above n 336, 311 defining civil society as ‘a political arena where associations of citizens seek, from outside political parties, to shape the rules that govern one or the other aspect of their common life.’ See also Willetts, ‘From Stockholm to Rio’, above n 30, 21-22, 25.

<sup>353</sup> Wladyslaw Czaplinski, ‘Recognition and International Legal Personality of Non-State Actors’ (2016) *Pecs J Int'l & Eur L* 7.

<sup>354</sup> Charnovitz, ‘Nongovernmental Organizations’, above n 30, 356-357 discussing issues with granting international legal personality to NGOs; also, see *CCAMLR-IV Meeting of 2 – 13 September, 1985*, ‘Report of the Fourth Meeting of the Commission’ (Hobart, Australia, adopted 13 September 1985) [48] where the CAMLR Commission was concerned with the adherence of the Antarctic and Southern Ocean Coalition (ASOC) NGO to the domestic legal personality requirement of possessing a Constitution.

where membership and purpose is relevant as they are NGO-specific identification factors.

The process of identification of NGO types is represented in Figures 1-3 below.



Figure 4.1 simple equation demonstrating what constitutes an NGO

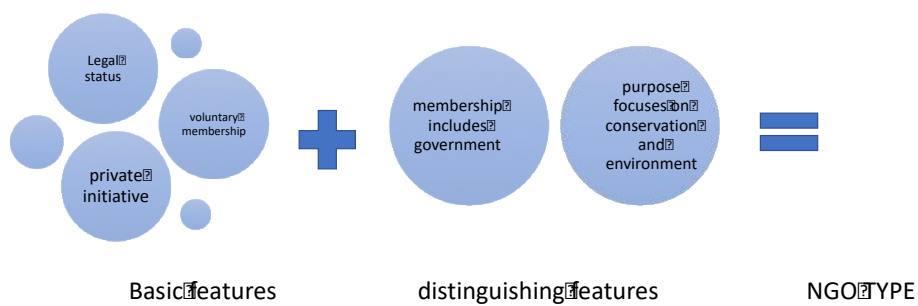


Figure 4.2 Identifying a hybrid NGO

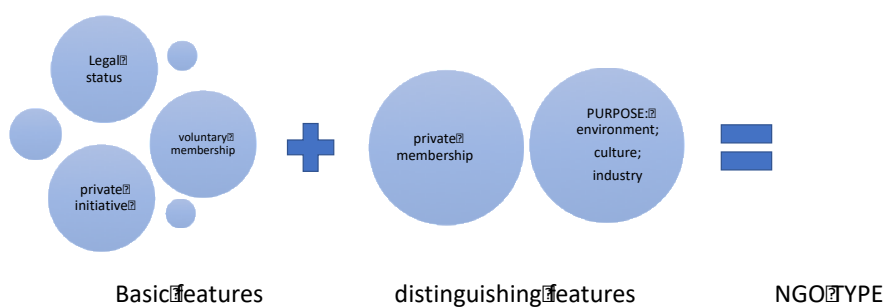


Figure 4.3 Identifying other NGO types

NGO type is a means of distinguishing between different NGOs. Being able to distinguish between NGOs on the basis of purpose allows us to evaluate contributions by different NGOs. The contributions of scientific NGOs versus those of environmental NGOs may be

radically different. However, if neither was defined by their purpose, the contributions of each could be conflated as the contributions of NGOs as a class.

The purpose of NGOs engaging with international environmental law tends toward four categories mentioned earlier: environment, culture, science and industry. These are discussed in depth below at [4.4]. However, it is sufficient here to note that to distinguish NGOs from each other, purpose provides a clear means of doing so, and allows for greater analysis and understanding of NGOs as actors within the legal frameworks of treaty bodies.

In summary, this definition of NGO is a means of clearly identifying NGOs as opposed to other organizational types that operate within the legal framework of treaty bodies. This makes it possible to provide individual analyzes of the contributions of each distinct NGO type. All non-state actors function within the same parameters of engagement in roles such as observers or delegation members, but all non-state actors are distinct organizational types and should be recognised as such to give value to analysis.

The next section addresses the normative roles that might be available to NGOs within the legal frameworks of treaty bodies. It also addresses the issues around NGOs engaging in non-normative roles, called here 'subversive roles'.

NGOs have been recognised as beneficial contributors to international law, providing financial assistance, expertise and representation in the development and implementation of international law.<sup>355</sup> Roles of NGOs have been extensively categorised in the literature,<sup>356</sup> and it is not necessary to go into depth on these, as the roles of NGOs here are defined by the legal regimes with which they engage, either as accredited observers, or aberrant actors.

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<sup>355</sup> Martens, above n 18; Raustiala, above n 307; Willetts, 'From Stockholm to Rio', above n 28; William E DeMars, *NGOs and Transnational Networks. Wild Cards in World Politics* (Pluto Press, 2005).

<sup>356</sup> Charnovitz, 'Two Centuries', above n ; Charnovitz, 'Nongovernmental Organizations', above n 30; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998) Chapter 11, 252; Oberthür et al, above n 311.

In pursuit of their purpose, NGOs may perform both normative roles and roles that fall outside of this and may be termed 'subversive'.<sup>357</sup> Normative roles are roles that NGOs perform with the permission and authority of states for the role.<sup>358</sup> These normative roles of NGOs are tied specifically to the legal regimes in which the NGOs engage. The following discussion of formal roles tends to the normative, while the discussion of intersessional roles notes the subversive. Subversive is a term developed for this thesis. Subversive refers to roles undertaken by NGOs that fail to meet the normative standards of international organizations and states, and which seek to challenge the existing mechanisms for dispute resolution and/or law enforcement in those organizations. Key examples of this are the engagement of Sea Shepherd Conservation Society (Sea Shepherd) in "policing" the JARPA II scientific whaling programs of the Japan in the Southern Ocean, and the pursuit of the vessel, the *Thunder* to prevent IUU fishing.

The boundaries of NGO roles *should* be found in the Conventions and in the *Rules of Procedure* and other subordinate documents, such as Meeting Reports, Resolutions and Conservation Measures. This doesn't mean that they are found there. Ideally, NGO behaviours and international legal personality in treaty bodies should be confined by the legal regimes.<sup>359</sup> Of course, this just means that ideally, NGO roles should remain normative roles to support treaty regimes. However, many aspects of NGO engagement is informally defined, and the nature of international law, such as freedom of the high seas, prevents some aspects of prevention or regulation in relation to non-state behaviours.

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<sup>357</sup> The term 'subversive' arose during my research. Observing the actions of groups such as Sea Shepherd Conservation Society (Sea Shepherd), and to a lesser extent, Greenpeace, it became clear that there were behaviours on the part of NGOs that attempted to exploit a *lacuna* in international law and so 'subvert' the assumed order with states as the primary and dominant actors. This was observable in Sea Shepherd and Greenpeace interference in Japanese research voyages to the Southern Ocean, and the ongoing claims of 'jurisdiction' from Sea Shepherd in pursuing Japanese research vessels.

<sup>358</sup> Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *The American Journal of International Law* 291, 299.

<sup>359</sup> Ryngaert, above n 306, 184; Raustiala, above n 307, 720-724; Hein-Anton van der Heijden, 'Globalization, Environmental Movements, and International Political Opportunity Structures' (2006) 19(1) *Organization & Environment* 28, 33-38.



#### 4.4 NGO roles as observers

The observer position is the formal access point for non-state actors, including NGOs, to the Whaling and CAMLR Commissions. The observer position defines most roles, both formal and informal, available in the Commissions. It is largely defined by convention Articles, and *Rules of Procedure* and *Rules of Debate* developed for Commission meetings. Literature supports the view that NGO behaviours, and international legal personality, are ideally confined by the legal regimes in which they act.<sup>360</sup> A convention's influence on NGO roles, and the effect of *Rules of Procedure* and *Rules of Debate* in defining NGO behaviour is important to consider in order to determine to what extent the CAMLR Commission and Whaling Commission confine NGO behaviours.

This section looks at the aspects of the observer position that give NGOs access to the Commissions and to member states and the convention and rule-based origin of this position. This section details the capacities available to NGOs as observers. The capacities available to observers are formal – those provided for in the *Rules of Procedure* and/or *Rules of Debate*, and informal – those that are incidental to having a presence at meetings or other Commission-based gatherings, such as workshops in the intersessional period.

The formal and informal roles of NGOs allow NGOs to engage with international organizations behaviours that have been documented and studied among international governance scholars.<sup>361</sup> The roles generally attributed to NGOs in international law are engaged through the observer position. Roles that attach to the observer position

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<sup>360</sup> Ryngaert, above n 306, 184; Raustiala, above n 307, 720-724; Hein-Anton van der Heijden, 'Globalization, Environmental Movements, and International Political Opportunity Structures' (2006) 19(1) *Organization & Environment* 28, 33-38.

<sup>361</sup> Lutz Schrader and Tobias Denskus, 'Introduction: Transnational NGOs and Legitimacy, Accountability, Representation' in Jens Steffek and Kristina Hahn (eds), *Evaluating Transnational NGOs* (Palgrave Macmillan, 2010); Charnovitz, 'Two Centuries', above n 30; Oberthür et al, above n 311; Charnovitz, 'Nongovernmental Organizations', above n 30; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998) Chapter 11, 252; Nowrot, above n 22; Raustiala, above n 307; Willetts, above n 28; Massoud, above n 308; Irrera, above n 308, 44-67; Barrat, above n 308; Sumariwalla, above n 288; Esty, above n 288; Sjöstedt, above n 308; Ryngaert, above n 306.

include providing transparency of institutional decision-making to global populations,<sup>362</sup> and engaging public opinion across geographical and population limitations that otherwise hinder states in their influence.<sup>363</sup> Other capacities include networking and coalition-building,<sup>364</sup> gathering, analysing and disseminating information or data that bears on decision-making,<sup>365</sup> promoting policy development or change through advocacy,<sup>366</sup> and contributing to the development of prescriptive rules or policies that have authority over member states of treaty bodies.<sup>367</sup> As becomes clear below, all of these capacities are engaged in by NGOs through the position of observer. Attendance at meetings facilitates transparency activities, networking and coalition building through the relationships developed ‘in the margins’ of the meetings. The capacity to comment on the agenda and provide documents for the Commission’s consideration facilitates advocacy, policy and rule development and the provision of data to bear on decision-making. However, as will also be explained, there is a capacity for NGOs to hinder the work of international organizations in performing these functions.<sup>368</sup>

#### 4.4.1 The position of observer in the Whaling and CAMLR Commissions

The observer position in the Whaling Commission and the CAMLR Commission is open to non-state actors and non-member states. NGO observers differ from other observers,

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<sup>362</sup> Oberthür et al, above n 311, 46.

<sup>363</sup> Hein-Anton van der Heijden, ‘Globalization, Environmental Movements, and International Political Opportunity Structures’ (2006) 19(1) *Organization & Environment* 28; Thomas G Weiss and Leon Gordenker, *NGOs, the UN, & Global Governance* (Lynne Rienner, 1996); Fallon, above n 35.

<sup>364</sup> See Schrader and Denskus and others above n 360.

<sup>365</sup> Oberthür et al, above n 311, 40; Charnovitz, ‘Nongovernmental organizations’, above n 30, 353, 362.

<sup>366</sup> Oberthür et al, above n 311, 43. Charnovitz, ‘Nongovernmental organizations’, above n 30, 350, 352, 362, 364.

<sup>367</sup> Oberthür et al, above n 311, 48-50. Charnovitz, ‘Nongovernmental organizations’, above n 30, 349, 354, 359.

<sup>368</sup> Charnovitz, ‘Two Centuries’, above n 30, 280-282; Oberthür et al, above n 311, 53-70.

such as companies, IGOs, and non-member states because of their distinct legal identities.<sup>369</sup>

The *Rules of Procedure* and *Rules of Debate* provide a useful starting point for considering NGO roles. This section looks at the official roles of observers, as well as roles that attach to unofficial aspects of observer NGO engagement, such as ‘in the margins’ relationships with state delegates, and intersessional behaviours that may not be Commission-sanctioned. After this, the following section considers an object and purpose analysis of the *Rules* in relation to the Article XXIII of the *CAMLR Convention* and Article IV of the *Whaling Convention*.

A distinction is drawn between formal and informal roles, as well as sessional, intersessional and subversive. Formal roles of NGOs are those that take place within the legal structures of treaty bodies. Observer status, membership of a government delegation, and *amicus curiae* are all examples of formal roles. Informal engagement takes place in the margins of formal. These spaces give rise to informal roles that mirror their formal counterparts. NGOs speak with government representatives, and lobby in that context. Documents are often made available, presenting information and policies from particular NGOs. Informal roles that exist outside the narrow margins of a formal position can be subversive, particularly in cases where protest takes the form of verbal or physical violence rather than articulate demonstration.<sup>370</sup>

Sessional engagement is where observer NGOs interact during meetings of the Commission or its subsidiaries. These periods include both formal and informal roles. Intersessionally, there are limits to what NGO observers can do. However, NGOs can

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<sup>369</sup> This definition does reclassify one organization, the IUCN, as an NGO where it has frequently been classified as an IGO. The legal status of the IUCN is as an NGO through the Swiss Civil Code, and it is not established in the same way as IGOs, including the Whaling and CAMLR Commissions; It is also important to distinguish roles attributable to NGO observers as distinct from roles attributable to NGO actors that act outside the observer position. NGO representatives as delegation members, or as domestic actors, are not the subject of this thesis as their roles are filtered directly through the state entity and are not engaged with the Commission directly. The focal relationship is that between the Commission and the NGO observer.

<sup>370</sup> For example, representatives of Sea Shepherd Conservation Society (Sea Shepherd) are often seen at Whaling Commission meetings, outside of the meeting place, and while some protests are a peaceful and articulate opposition to a particular policy position, usually of Japan, others devolve into verbal abuse.

engage in unsanctioned support of the decisions of the Commissions – such as reporting information on IUU fishing vessels to a Commission’s Secretariat or attempting to enforce what they perceive to be breaches of a treaty. These latter two are, respectively, formal intersessional and subversive intersessional behaviours.

#### 4.4.2 Attendance

The *CAMLR Commission Rules of Procedure* permit all observers to attend any private or public sessions of the Commission.<sup>371</sup> Current practice excludes observers from attending working group meetings. Observers may attend the meetings of the Standing Committee on Implementation and Compliance (SCIC) but not the Standing Committee on Administration and Finance (SCAF). Observers may also, depending on their expertise, be invited to, or even fund or organise workshops that contribute to the work of the CAMLR Commission. Observers are also permitted to observe at the Scientific Committee meetings, if they hold relevant scientific qualifications.<sup>372</sup>

The *Whaling Commission Rules of Procedure* permit observers to attend all meetings of the Commission, including subsidiary committees, but excluding meetings of the Bureau, closed meetings of the Finance and Administration Committee, or meetings constituted only of Commissioners.<sup>373</sup> Similarly, the Scientific Committee of the Whaling Commission generally only permits observers with suitable scientific qualifications, as long as they are also associated with an observer group accredited by the Commission.<sup>374</sup>

The relevance of accreditation as an observer and the capacity to attend other meetings related to the Commissions is relevant to considering the range of papers submitted by NGO observers, as well as in understanding how, and to what degree, observer

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<sup>371</sup> *CAMLR Commission Rules of Procedure*, Rule 33.

<sup>372</sup> *CAMLR Commission Scientific Committee Rules of Procedure*, Rule 19.

<sup>373</sup> *Whaling Commission Rules of Procedure* (2014) in *IWC 65<sup>th</sup> Annual Meeting of 15<sup>th</sup> – 18<sup>th</sup> September 2014*, ‘Sixty-Fifth Annual Report of the International Whaling Commission 2014 – covering the July 2012 – October 2014 financial year’ (adopted Portorož, Slovenia, October 2016) Rule C.2. (*Whaling Commission Rules of Procedure*).

<sup>374</sup> *Whaling Commission Scientific Committee Rules of Procedure*, Rule A.5.

behaviours, such as addressing the Commission on an agenda item, are controlled by existing rules.

#### 4.4.3 Formal: Speaking to the agenda

The *Rules of Procedure* of the two Commissions grant observers the capacity to speak to the agenda of the Commission plenary meeting. Observers may also to speak to the agenda in subcommittee meetings in both Commissions. The speaking rights of NGO observers in both Commissions are currently framed as the right to speak to an agenda item, although this is a recent development in the Whaling Commission.<sup>375</sup>

Speaking to the agenda can be an influential activity in both Commissions. However, there are clear differences in how it is used. For example, in the Whaling Commission in 2014, the capacity to speak to the agenda was utilised by the Animal Welfare Institute (AWI) to address the New Zealand Commissioner on perceived hypocrisy in New Zealand's condemnation of Japanese scientific whaling, and its own critically endangered Hector and Maui dolphins.<sup>376</sup> In the CAMLR Commission, the use of the capacity to speak to the agenda is reserved for restating policy positions of the observer NGO.

The difference may be attributable to the consensus requirement of Article XII of the CAMLR Commission, which means that a Member State of the CAMLR Commission can exclude an observer by withdrawing consent to their accreditation and invitation as an observer. A second contributing factor is that in the Whaling Commission, where observer numbers have risen to over 100 at various times, there is a level of expendability if, or when, a Member State objects to the presence of a particular NGO for their conduct.

Outside of the formal means of engaging, NGOs utilise the 'margins' of CAMLR Commission meetings to engage with Commissioners, delegates, other observers, and Secretariat staff to put forward their agenda.

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<sup>375</sup> *IWC 65<sup>th</sup> Annual Meeting of October 2014*, 'Annual Report of the International Whaling Commission 2014 – covering the period July 2012 – October 2014 (65<sup>th</sup>)' (Portorož, Slovenia, adopted October 2014) 8 and 48-49.

<sup>376</sup> Personal observation of candidate; *IWC 65<sup>th</sup> Annual Meeting of October 2014*, 29.

#### 4.4.4 Formal: Document submission

The document submission rules of the two Commissions differ in key respects. The CAMLR Commission has two types of document: Working Papers and Briefing Papers. Working Papers are papers for the direct consideration of the Commission under the agenda and may become Resolutions or Conservation Measures. Background papers are contributory information around agenda items. Only briefing papers may be submitted by NGOs.

The Whaling Commission has more restrictive document submission rules, with observers having the right to submit Position Statements at the beginning of the Commission meeting. Until 2014, observers had no power to submit information documents to the agenda of the meeting, however amendments to the *Rules of Procedure* now permit this engagement.<sup>377</sup> The previous restriction means that observers engage extensively in the margins of meetings distributing media around whaling issues.<sup>378</sup> Until 2014, Position Statements were the only formal means of engagement available to NGOs, but until 1980, Position Statements were read aloud at the beginning of meetings.<sup>379</sup>

As with speaking rights, the capacity to engage with delegates outside of the formal structure is also present and engaged in with an informal equivalent. In the margins of a plenary meeting, observers can distribute or display documents that support their position, and which seek to influence delegations or at the minimum maintain visibility for a policy. This formal-informal use of document submission is mirrored with the strong speaking relationships that exist between states and NGOs, with much informal discourse taking place within the Commission plenary meeting margins at the regular break intervals, and at evening or lunch time functions.

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<sup>377</sup> *Whaling Commission Rules of Procedure*, Rule 3.1.(c).

<sup>378</sup> The display of information documents in areas outside the meeting rooms are not part of the formal Commission process is governed by informal and unwritten rules.

<sup>379</sup> Thirty-second meeting of the IWC, *Verbatim Records*, 1980, Resource ID 422.

#### 4.4.5 Informal: In the margins

In the margins, NGOs utilise the capacity to have conversations and distribute documents to Commissioners and delegates. In addition to conversation, which is readily available at the morning and afternoon tea breaks, NGO observers also use other means of communication, including demonstrations, street art, and temporary banner advertising on nearby buildings. These have varying degrees of prominence. For example, at the 2017 CAMLR Commission meeting ASOC placed temporary banners supporting MPA designation on The Duke, a hotel facing the CCAMLR Secretariat building where the meeting is held. In addition, there was pavement stencilling involving depictions of penguins and the message to 'Designate Now' and the ASOC logo.

At the Whaling Commission meetings in 2014 and 2016 in Slovenia, several protesters associated with Sea Shepherd and affiliate groups attended outside the Commission meeting. These representatives were corralled into a small fenced area nearly 20m from the formal entrance to the conference venue, resulting in very little contact between delegates and protesters, except where delegates deliberately chose to engage. Delegates most often used the rear entrance to the conference venue, or remained within its confines, as it was both a conference venue and a hotel. This meant that delegate could avoid unpleasant interactions with protesters. However, in 2016, a small number of Sea Shepherd protesters positioned themselves at the rear entrance of the hotel and took the opportunity to verbally abuse the Japanese Commissioner, Joji Morishita. Unsanctioned engagement such as this falls outside both international norms<sup>380</sup> but it does demonstrate the capacity for NGOs to affect the tone of meetings, and so influence decision-making.

#### 4.4.6 Nature of contributions as observer and other NGO roles

NGO observers and NGOs in the intersessional period make a range of contributions, including providing general data or data systems, implementation of conservation measures or programs, such as research, communication of data, compliance with

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<sup>380</sup> John S Dryzek, 'Global Democratization: Soup, Society, or System?' (2011) 25(2) *Ethics & International Affairs* 211, 221; Nowrot, above n 18, 635; Jozef A Kosc, 'Engaging Global Civil Society: Shifting Normative Frameworks, Moral Diplomacy, & the Future of International Relations' (2015) 1(1) *The Journal of International Relations, Peace Studies, and Development* 1, 4-5.

regulatory requirements, and attempts to enforce perceived or actual breaches of conservation measures enshrined in law. Implementation of conservation measures or programs by NGOs is rare in the Whaling and CAMLR Commissions, although other international environmental law forums utilise NGO resources more fully.<sup>381</sup>

Areas of key contribution for NGOs around the CAMLR and Whaling Commissions are what Charnovitz describes as ‘intelligence function’ and ‘promotion function’. The intelligence function involves gathering, analysing and/or disseminating information or data that bears on decision-making, usually by states or IGOs. The promotion function is directed advocacy, seeking to either maintain, bolster or alter decision-maker policy positions.<sup>382</sup>

Invocation, which is invoking rules or laws and advocating for the adherence to those laws in relation to a perceived breach by states or other actors has been engaged with in both Commissions, with invocation being used to highlight issues with state implementation of treaty obligations. Invocation was used to great effect in the CAMLR Commission, as is discussed in Chapter Six by COLTO in relation to IUU fishing. Invocation is also associated with the actions of Sea Shepherd in relation to the Japanese JARPA II scientific whaling in the Southern Ocean, and with a few instances in the Whaling Commission, in relation to cold grenade harpoons.

Other areas, such as prescription, while possible in the two Commissions, are not available to observers. Prescription requires partnership with a state and is therefore

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<sup>381</sup> TRAFFIC, an NGO wildlife trade monitoring network collaborates with the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* on implementation of programs, as well as other aspects of addressing the trade in endangered species: K Nowell, *Species Trade and conservation. Rhinoceroses. Assessment of rhino horn as a traditional medicine. A report prepared for the CITES Secretariat* (CITES/TRAFFIC, 2012); the partnership between the World Customs Organization (WCO) and TRAFFIC involves significant input of resources, training and strategic knowledge for project implementation, TRAFFIC, *WCO and TRAFFIC sign MOU to build the enforcement capabilities of Customs frontline officers* (21 October 2013) TRAFFIC, <http://www.traffic.org/home/2013/10/21/wco-and-traffic-sign-mou-to-build-the-enforcement-capabiliti.html>; see also the Memorandum of Understanding (MOU) between CITES and TRAFFIC: *Memorandum of Understanding Concluded between TRAFFIC Intl and the United Nations Environment Programme, Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (The CITES Secretariat)* (1 November, 1999).

<sup>382</sup> Charnovitz, above n 30, 271-273.



subsumed by domestic relations between NGO and state. It falls outside the observer position.

The fundamentals of contributions, as will be seen in the case study chapters, involve providing information, lobbying for a policy position, highlighting perceived breaches of law, or assisting, usually to a limited degree, in implementation. NGO observers in the CAMLR and Whaling Commissions have two possible forms of formal contribution: documentary and oral, and a third is added for informal or intersessional roles: action-based. There are two possible forums: in the Commission framework or outside of the Commission framework. However, if action is unsanctioned by either Commission, it is a subversive NGO role, either by virtue of undermining the authority of a Commission, or by defying the object and purpose of a Convention.

#### 4.5 Subversive roles

This section considers the nature of NGO engagement outside of the framework of either the *CAMLR Convention* or *Whaling Convention*, particularly that of the Sea Shepherd Conservation Society (SSCS). Since this conduct falls outside of the Commission meetings and formal Commission recognition of NGOs, it is best considered “subversive”. This section then concludes with a summary of the roles available to NGOs both as observers, and in subversive conduct with the Commissions.

Subversive roles are not directly sanctioned by states, but act on, or attempt to influence the legal regimes that have created normative NGO roles. For example, NGOs admitted as observers to a plenary meeting of Contracting Governments to a treaty are engaging with the legal regime in order to carry out normative roles. Non-admitted NGOs may nonetheless engage with the legal regime from a non-normative standpoint, such as protests, media-directed boycott or critical coverage of a treaty body event. Subversive roles may even extend to attempted enforcement of perceived legal transgressions by states or other parties.<sup>383</sup>

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<sup>383</sup> Joseph Elliott Roeschke, ‘Comment: Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters’ (2009) 20 *Villanova Environmental Law Journal* 99; Donald K Anton, ‘Protecting Whales by Hue and Cry: Is There a Role for Non-State Actors in the Enforcement of International Law?’ (2011) 14 *Journal of International Wildlife Law & Policy* 137.

Obvious subversive NGO roles are not common in international law, but they do occur, and they are addressed in academic literature.<sup>384</sup> Subversive roles are not simply antagonistic roles of protest; protest and lobbying are recognized as normalised behaviours. However, subversive roles can take place in the space between the formal roles conferred upon NGOs, and they can inhabit 'grey areas' in the law. Where grey areas exist, the subversive activities of NGOs may be politically strong or publicly-applauded, but they are legally weak, relying on vigilante sentiment and specious legal argument.<sup>385</sup> They can also have no legal basis at all, and are presented simply as policy positions on the part of NGOs. These generally fail to take account of the legal mandate of a Convention and its treaty body. This is particularly so where the policy position of an NGO is at odds with the legal mandate of an IGO, and the treaty's object and purpose.

## 4.6 Object and purpose analysis of the non-state actor provisions in the Conventions

### 4.6.1 Introduction

The non-state actor provisions in the *Whaling* and *CAMLR Conventions* are markedly different. Article IV of the *Whaling Convention* directs the capacity of non-state actors to three specific topics of engagement, while Article XXIII of the *CAMLR Convention*

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<sup>384</sup> Gillian Triggs, 'The *Antarctic Treaty* System: A Model of Legal Creativity and Cooperation' in Berkman, Paul Arthur et al, *Science Diplomacy. Antarctica, Science, and the Governance of International Spaces* (Smithsonian Institution Scholarly Press, 2011) 47; Sam Blay and Karen Bubna-Litic, 'The interplay of international law and domestic law: The case of Australia's efforts to protect whales' (2006) 23 *Environmental Policy and Law Journal* 465, 466; Mike Iliff, 'Contemporary initiatives on the future of the International Whaling Commission' (2010) 34 *Marine Policy* 461, 466; Avi Brisman, 'Crime-Environment Relationships and Environmental Justice' (2007-2008) 6 *Seattle Journal of Social Justice* 727, 755; Guevara, above n 35, 63; Christopher J Covill, 'Greenpeace, Earth First! and The Earth Liberation Front: The Progression of the Radical Environmental Movement in America (2008) 5 *Senior Honors Projects*. Paper 93, 16, 23, 101; Julia Jabour and Mike Iliff, 'Theatre sports in the Southern Ocean: engagement options for Australia in whale research protest action' (2009) 63(2) *Australian Journal of International Affairs* 268, 276-281, 284-285; Gerry Nagtzaam and Peta Lentini, 'Vigilantes on the High Seas?: The Sea Shepherds and Political Violence' (2007) 20 *Terrorism and Political Violence* 110; Fallon, above n 35, 77; Anton, above n 383, 138, 145; Roeschke, above n 383, 136.

<sup>385</sup> Consider Anton, above n 383 and his thorough repudiation of the poorly executed legitimisation of Sea Shepherd activities put forward by Roeschke, above n 383.

provides broad cooperative directions on engagement with non-state actors. Much of the difference can be attributed to the age of the Conventions, as the *Whaling Convention* was drafted at a time when the issues that were contemporary to the drafting of the *CAMLR Convention* were not yet imagined – particularly the proliferation of NGOs in international law. Between 1946 and the admission of the first NGO observer in 1962, engagement in the Whaling Commission with outside actors was primarily with organs of the United Nations.<sup>386</sup> From 1972, due to the success of lobbying around the Stockholm Conference,<sup>387</sup> NGOs became increasingly present in international law, and so the drafting of the *CAMLR Convention* had time to anticipate the presence of such actors in the Commission.

The legal basis for engagement with non-state actors in the Whaling and CAMLR Commissions is found in their respective Conventions, the *Whaling Convention* in Article IV and the *CAMLR Convention* in Article XXIII. These are the first reference points for the argument that NGOs should conform to the object and purpose of the specific Convention with which they engage, and by which we can assess the compliance of NGOs with substantive obligations within the object and purpose. The Articles are also the first reference point for defining the types of NGO behaviours formally permitted by the Commissions.

Subsequent practice, Resolutions and the *Rules of Procedure* are also significant. The *Rules of Procedure* detail the mechanisms of engagement for Commission plenary meetings and for communication during the intersessional period. The *Rules of Procedure*, and the *Rules of Debate*, define the nature of engagement. Resolutions, particularly in the Whaling Commission are significant in establishing existing practice that was not anticipated by Article IV. This is akin to subsequent practice but does not amount to subsequent practice.

Both the Whaling and CAMLR Commissions require any actor seeking observer status to apply for status and to demonstrate an interest in or possible contribution to the

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<sup>386</sup> *IWC 1<sup>st</sup> Annual Meeting of 1<sup>st</sup> June 1949*, 'First Report of the International Whaling Commission – covering the 1<sup>st</sup> fiscal year 1<sup>st</sup> June 1949 – 31<sup>st</sup> May 1950' (Oslo, Norway, adopted July 1950) 21: the Food and Agriculture Organization of the United Nations sent a representative to the 1<sup>st</sup> Whaling Commission meeting.

<sup>387</sup> Birnie, above n 220, 637, 639-640.

organization. The requirements for the CAMLR Commission have historically been more stringent, and the Commission continues to limit the number of observers. The Whaling Commission, by contrast has a less onerous process, and admits many more observers than are permitted at CAMLR Commission meetings.

The intention of this section is to clarify the nature of the non-state actor provisions, Article XXIII of the *CAMLR Convention* and Article IV of the *Whaling Convention* according to an object and purpose interpretation of each provision.

#### 4.5.2 The observer under the *CAMLR Convention*: Article XXIII and the *Rules of Procedure*

Article XXIII of the *CAMLR Convention* considers collaborative arrangements between the Commission and non-state actors, and the admission of observers to Commission meetings. The *CAMLR Convention* provides only three categories: inter-governmental, nongovernmental and 'other organizations'. Observer status is the primary engagement mechanism for non-state actors. Article XXIII (3) specifies that 'The Commission and the Scientific Committee shall seek to develop co-operative working relationships, as appropriate, with inter-governmental and nongovernmental organizations which could contribute to their work...', while subsection 4 includes 'other organizations as may be appropriate'.

Article XXIII reads:

1. *The Commission and the Scientific Committee shall co-operate with the Antarctic Treaty Consultative Parties on matters falling within the competence of the latter.*
2. *The Commission and the Scientific Committee shall co-operate, as appropriate, with the Food and Agriculture Organization of the United Nations and with other Specialised Agencies.*
3. *The Commission and the Scientific Committee shall seek to develop co-operative working relationships, as appropriate, with inter-governmental and nongovernmental organizations which could contribute to their work, including the Scientific Committee on Antarctic Research, the Scientific Committee on Oceanic Research and the International Whaling Commission.*
4. *The Commission may enter into agreements with the organizations referred to in this Article and with other organizations as may be appropriate. The Commission and the*

*Scientific Committee may invite such organizations to send observers to their meetings and to meetings of their subsidiary bodies.*

The text of the Convention at Article XXIII outlines the basic relationship with the FAO and the Antarctic Treaty Consultative Parties (ATCP), as well as with non-government organizations (NGOs) and other non-state actors. It permits engagement with the Commission and Scientific Committee through cooperative working relationships on the basis of the organization's capacity to contribute to the work of the Commission or Scientific Committee.

The role giving effect to this participatory Article is the observer role. The observer role is situated within Commission plenary meetings, but extends to the intersessional period, as well as into some other meetings. The CAMLR Commission has instituted an application process for NGOs to apply for accreditation as observers. The role of observer is governed by the *CAMLR Commission Rules of Procedure*. Ideally, the application process and the *CAMLR Commission Rules of Procedure* around observers should reflect the content of Article XXIII, indicating the qualities of cooperation, functionality, and contribution to the work of the Commission. The current abilities of the observer role reflect these aspects of Article XXIII.

In accordance with Article XXIII, beginning in 1982, the Food and Agriculture Organization (FAO), the Whaling Commission, the International Oceanographic Commission (IOC) and the IUCN were regular presences at CCAMLR meetings. From 1984, the Scientific Committee on Ocean Research (SCOR) and the Scientific Committee on Antarctic Research (SCAR) began regular attendance. The Antarctic and Southern Ocean Coalition (ASOC) became an observer in 1988 at CCAMLR-VII, the Coalition of Legal Toothfish Operators (COLTO) at CCAMLR-XXII in 2003, and the Association of Responsible Krill Harvesting Companies (ARK) at CCAMLR-XXXI in 2012. The IUCN has had almost consistent observer presence, with an absence between CCAMLR-VII in 1988 lasting through to CCAMLR-X in 1991, reappearing at CCAMLR-XI in 1992.

Article XXIII(4) provides a broader scope for the approval of any organization referred to in Article XXIII. Subsection 4 reads that the 'Commission may enter into agreements with the organizations referred to in this Article and with other organizations as may be

appropriate.’<sup>388</sup> Subsection 4 allows the Commission freedom of association with any organization deemed to be useful and appropriate to the Convention’s object and purpose, no matter the organization’s legal identity.

An object and purpose reading of Article XXIII requires that principles of conservation, use, science, and the future of mankind, are considered in relation to the participation of NGOs, and other non-state actors. The direction of Article XXIII makes clear that while NGOs can *inform* decisions within the forum of the Commission, it cannot set the agenda in that forum. Domestic avenues remain open to NGOs, but the formal mechanisms around NGO engagement in the CAMLR Commission plenary meetings prevent interference. This does not necessarily reflect the capacity of NGOs to influence or interfere with Member decision-making through other means.

#### 4.5.3 Document submission in the CAMLR Commission

Article XXIII of the *CAMLR Convention* and the *CAMLR Commission Rules of Procedure* have clear object and purpose boundaries set for NGO engagement as observers. The discussion below connects NGO roles and the rules and Articles applicable to them as observers.

Within the CAMLR Commission, there are two important classes of documents: Working Papers and Background Papers. Background Papers are also referred to as information documents in Rule 35. Contracting Governments can submit both Working Papers and Background Papers.<sup>389</sup> As observers, NGOs can only submit Background Papers. Working Papers ‘relate directly to agenda items. Background Papers contain more general information and are related to overall objectives of the Convention.’<sup>390</sup> Background Papers are covered by Rule 35 of the *CAMLR Commission Rules of Procedure*, which gives observers the capacity to –

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<sup>388</sup> *CAMLR Convention*, Article XXIII.4.

<sup>389</sup> *Rules for Access and Use of CCAMLR Data*, [3] and [11].

<sup>390</sup> *CCAMLR-IV Meeting of 2 – 13 September 1985*, ‘Report of the Fourth Meeting of the Commission’ (Hobart, Australia, adopted 13 September 1985) [53]; another difference, highlighting the higher status of Working Papers is that ‘Working Papers are translated entirely into the four languages of the Commission. Background Papers are distributed in their original language with only a short, translated summary and translated figure and table captions.’ [54].

- (a) ... submit documents to the Secretariat for distribution to Members of the Commission as information documents. Such documents shall be relevant to matters under consideration in the Commission;*
- (b) Unless a Member or Members of the Commission request otherwise such documents shall be available only in the language or languages and in the quantities in which they were submitted;*
- (c) Such documents shall only be considered as Commission documents if so decided by the Commission.*

Rule 35 requires that the documents 'shall be relevant to matters under consideration in the Commission'. In addition, the Commission has made it clear that Background Papers should also relate to *the overall objectives of the Convention* [emphasis added].

There is a strong relationship between Article XXIII of the *CAMLR Convention* and Rule 35. Article XXIII emphasises that the relationship between the Commission and NGOs is a cooperative working relationship founded in contributing to the work of the Commission. As the work of the Commission is fundamentally the furtherance of the *CAMLR Convention* object and purpose, the requirement of Rule 35 that Background Papers relate to the overall objectives of the Convention clearly connects the observer rules of engagement with the specifics of Article XXIII and with the object and purpose.

NGOs have contributed to information roles of knowledge enhancement review, and to a limited degree, transparency. The NGO roles of policy development, legal interpretation and advocacy/lobbying are variously engaged through the document submission rights of observers.

Within the margins of the CAMLR Commission meetings, ASOC members engage with informal information and input roles through distribution of the 'ECO', a newsletter containing commentary on the course of the meeting, with a bias toward the position of ASOC in relation to issues before the Commission. Industrial NGOs – COLTO and ARK – do not engage with informal documentary submission but do engage on the basis of formal rights of access under Rule 35.

#### 4.5.4 Speaking rights in the CAMLR Commission

Speaking rights attach to either the introduction of a paper, or to addressing an agenda item on a salient point. Observer speaking rights are carefully managed during CAMLR

Commission meetings, with some notable exceptions. Rule 34 of the *CAMLR Commission Rules of Procedure* states that:

*(a) The Chairman may invite observers to address the Commission unless a Member of the Commission objects;*

*(b) Observers are not entitled to participate in the taking of decisions.*

Observers have addressed the Commission at least once every meeting since 1987. Observers speak to agenda items with reference to the Background Papers, and policy positions. Speaking rights require an invitation to speak by the Chairman. This means that during meetings, observers are subject to the discretion of the Chair, the agenda item, the time available during the meeting, and the objection of any State party. Observer speaking rights are a truly secondary aspect of engagement. The place on the agenda of Cooperation with other Organizations has remained the final or near final item on the agenda for the life of the Commission.

In terms of the object and purpose, the relationship between Rule 34 and the *CAMLR Convention* is slightly more complex than that of Rule 35 and the Convention. While the document rule in Rule 35 has clear connections to the Convention through the agenda-relevant requirement in (a), the control in Rule 34 is through Rule 30. The nexus between Rules 30 and 34 and Article XII requires that the Chairman consider whether an invitation to an NGO to speak will inhibit consensus decision-making. While this does not reference the object and purpose directly, it reinforces the primacy of the Commission and its agenda under the Convention.

Rule 30 requires that the Commission consider Article XII in its invitations to observers, including in relation to Rule 34, which governs invitations to observers to speak to the agenda. Article XII of the *CAMLR Convention* is the basis for consensus decision making on all matters of substance in the Commission. Consensus decision-making is central to the CAMLR Commission process. This consideration influences the discretion of the Chair to allow an observer to address the Commission on an agenda item. Consensus is based on a Commission-wide agreement on the work at hand complying with the fundamental object and purpose principles of the *CAMLR Convention*. So, clearly, speaking to the agenda, an NGO observer must speak to support consensus, and in doing so, support the object and purpose principles of the convention.



The informal engagement of NGO observers with the CAMLR Commission members takes place within the margins of the meetings – ranging from discussion of an agenda item within the break times between sessions, to events paid for by NGOs at which their campaigns can be discussed with the lure of free wine and food to bring delegates to attend. The extent to which these informal aspects of speaking affect the Commission or demonstrate NGO capacities is impossible to measure. Specific incidents, such as the “scoreboard” for the Ross Sea MPA in 2014, where the Antarctic Ocean Alliance (AOA), a member of ASOC, set up a huge scoreboard, approximately 4 x 1.5 m in length and height, on which were indicated the Commission members that were preventing a consensus decision. Specific incidents such as the “scoreboard” are not measurable in terms of their impact, but they are in terms of their adherence to the object and purpose of the Convention.

#### 4.5.5 Intersessional roles

Intersessional roles are largely implementation-based. These roles include aspects of formal engagement, such as Commission associated workshops, but also include *ad hoc* support or enforcement of conservation measures, through supporting the Secretariat in data collection, and in communication with Commission members.

The *CAMLR Commission Rules of Procedure* do not address intersessional behaviour for observers, as the Rules are for Commission meetings only. However, the Article XXIII prescription for the Commission ‘to develop co-operative working relationships, as appropriate’ with NGOs affects the intersessional period. This has resulted in a workshop, bearing on the work of the Commission being organised, funded, and attended by a variety of actors,<sup>391</sup> as well the informal *ad hoc* attempts by Sea Shepherd to support the CAMLR Commission in its efforts to stop IUU fishing.<sup>392</sup>

#### 4.5.6 The observer under the *Whaling Convention*: Article IV and the *Rules of Procedure*

The *Whaling Convention* Article IV provides for non-state actor engagement with ‘independent agencies of the Contracting Governments or other public or private

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<sup>391</sup> ARK, *ARK Workshop for Krill Fishery Representatives and the Scientific Community to Share Information on Krill (5 and 6 July 2014, Punta Arenas, Chile)* SC-CAMLR-XXXIII/BG/21 (20 September 2014).

<sup>392</sup> Interview with Interviewee 7 (Hobart, 17 September 2015).

agencies, establishments, or organizations'. As with the *CAMLR Convention*, the *Whaling Convention* does not provide for the observer position – it is a position that has developed in practice, regulated by the Secretariat, the *Whaling Commission Rules of Procedure* and the *Whaling Commission Rules of Debate*.

The *Whaling Convention* has seven categories of actor – independent agencies of the Contracting governments, public agencies, public establishments, public organizations, private agencies, private establishments and private organizations. The nature of the focus in the subparagraphs 1 (a) – (c) are self-evidently scientifically oriented, indicating that the focus implicit in Article IV relies, if not on scientific organizations, then on organizations relying upon scientific data.

Article IV reads:

*1. The Commission may either in collaboration with or through independent agencies of the Contracting Governments or other public or private agencies, establishments, or organizations, or independently*

- a. Encourage, recommend, or if necessary organize studies and investigations relating to whales and whaling;*
- b. Collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon;*
- c. Study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.*

*2. The Commission shall arrange for the publication of reports of its activities, and it may publish independently or in collaboration with the International Bureau for Whaling Statistics at Sandefjord in Norway and other organizations and agencies such reports as it deems appropriate, as well as statistical, scientific, and other pertinent information relating to whales and whaling.*

Article IV creates a legal space within which non-state actors can engage collaboratively with the Commission or be delegated tasks around research into whales and whaling. Its scope is limited by the need for either a collaborative relationship with the Commission or delegation from the Commission.

A significant shift has taken place in the Whaling Commission since the drafting of the *Whaling Convention*, and Article IV. At times, over 100 different NGOs with one or more representatives have attended plenary meetings of the Commission. Subsequent practice has been toward opening the Commission to observers and commentators who may not fit within the scope of Article IV. Subsequent practice as well as Resolutions on civil society participation have demonstrated that the Commission has moved toward a broad, non-Convention based practice in relation to NGOs. This is not necessarily reflective of the decisions of *all* Contracting Governments.

Two aspects are notable by their absence from Article IV: the first is that no mention is made of non-state actors attending or participating in plenary meetings of the Commission or participating in intersessional processes. The second and most significant omission is that there is no independence of action for non-state actors provided for by Article IV. Action is only collaborative or delegated, indicating that the *Convention* and the Commission define the direction of any work, undertaken by non-state actors. An aspect of Article IV that favours a strict interpretation of the role of non-state actors, is the subsection 2 retention of the Commission's responsibility for publication of reports pertaining to work undertaken in subsection 1.

The permissible activities for non-state actors under Article IV are based in collaboration with the Commission, or delegation from. It also appears to implicitly require scientific bases for engagement. The collaboration or delegation extend to three areas: encouraging, recommending or organizing studies and investigations relating to whales and whaling; collecting and analysing statistical data on whale stocks and whaling impacts; and the study, appraisal and dissemination of information concerning methods of maintaining and increasing whale stock populations.

The three types of work under Article IV circumscribe the extent of permissible non-state engagement with the Whaling Commission – engagement must be in one of these three areas: whale and whaling studies, statistical data, and population health. So, to understand the implications for this, the terms of Article IV need to be interpreted in accordance with their ordinary meaning,<sup>393</sup> and in light of the object and purpose.<sup>394</sup>

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<sup>393</sup> *Vienna Convention*, Article 31(1).

<sup>394</sup> *Vienna Convention*, Article 31(1).

The first clause of Article IV is: 'The Commission may either in collaboration with or through ...'. The plain and ordinary meaning of the phrase is a clear intention to promote direct collaboration between the Commission and other organizations *or* delegation of Commission-formulated activities. The Commission is the primary actor as the subject of Article IV. Consider that the Commission may ... *through* ... private agencies encourage, recommend ... organize/collect and analyze.../study, appraise and disseminate;' To this extent, the inclusion of NGOs as private agencies was intended under the *Whaling Convention* to be that of an actor to whom activities were delegated by the Commission. The non-state actor is the object while the Commission is the subject. The extent of the relationship remains unsettled.<sup>395</sup>

Considering the categories for collaboration under Article IV, of use, conservative management and forward planning for stock increase, through scientific endeavor, the contents of Article IV reflect consideration of all object and purpose principles. While the language is dated, the contents of Article IV clarify the extent of consideration for non-state actor engagement as predicated on a basis of support and cooperation in pursuit of the object and purpose of the *Whaling Convention*.

The *Whaling Commission Rules of Procedure* were amended in 2014, giving speaking rights and extended document submission rights to observers.<sup>396</sup> The connection of Article IV and object and purpose of the *Whaling Convention* to the *Whaling Commission Rules of Procedure* are less clear in the Whaling Commission. The convention-basis for the Commission to engage with non-state actors rests on collaboration or delegation. The capacity for delegation and collaboration is restricted in Article IV to: studies and investigations relating to whales and whaling; the collecting and analysis of information on the condition and trends of whale stocks and whaling activity impacts; and study, appraisal and dissemination of information on methods of maintaining and increasing whale stock populations. These broad categories include a wide range of topics in relation to whaling, including killing methods.

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<sup>395</sup> *Resolution on NGOs IWC/53/33 rev1.*

<sup>396</sup> *IWC 65<sup>th</sup> Annual Meeting of October 2014, 'Annual Report of the International Whaling Commission 2014 – covering the period July 2012 – October 2014 (65<sup>th</sup>)' (Portorož, Slovenia, adopted October 2014) 8 and 48-49.*

However, unlike the CAMLR Commission, where the *Rules of Procedure* subordinate their operation to the requirement for consensus under Article XII of the *CAMLR Convention*, the *Whaling Commission Rules of Procedure* are detached from the requirements of the *Whaling Convention*. The provisions, as of 2014, of the *Whaling Commission Rules of Procedure*, relevant to NGO observers are:

*C. Observers*

1. (a) ...

(b) Any non-governmental organization which expresses an interest in matters covered by the Convention, **may be accredited as an observer. Requests** for accreditation must be **submitted in writing to the Commission 60 days prior to the start of the meeting** and the Commission may issue an invitation with respect to such request. Such submissions shall include the standard application form for non-governmental organizations which will be provided by the Secretariat. These applications shall remain available for review by Contracting Governments.

Once a non-governmental organization has been accredited through the application process above, **it will remain accredited until the Commission decides otherwise.**

Observers from each non-governmental organization will **be allowed seating in the meeting.** However, seating limitations may require that the number of observers from each non-governmental organization be limited. The Secretariat will notify accredited non-governmental organizations of any seating limitations in advance of the meeting.

(c) The Commission shall levy a **registration fee** and determine **rules of conduct**, and **may define other conditions** for the attendance of observers accredited in accordance with Rule C.1.(a) and (b). The registration fee will cover attendance at the Biennial Commission Meeting to which it relates and any other meeting of the Commission or its subsidiary groups as provided in Rule C.2 in the interval before the next Biennial Commission Meeting.

2. Observers accredited in accordance with Rule C.1.(a) and (b) are **admitted to all meetings of the Commission and the Technical Committee**, and to any meetings of Committees and all subsidiary groups of the Commission and the Technical Committee, **except the Commissioners-only meetings, meetings of the Bureau and closed meetings of the Finance and Administration Committee.**

*3. Observers accredited in accordance with rule C.1.(a) and (b) **will have speaking rights** during **Plenary sessions and sessions of Commission subsidiary groups and Committees** to which they are admitted to under C.2, in accordance with the Rules of Debate of the Commission. Observers might also **submit documents for information to the delegations and observers participating in such sessions**, provided these are submitted through the Secretariat **at least 48 hours before the session** in which they are intended to be made available, and are duly authored or endorsed by the accredited organization making the submission, which is to be held responsible for its contents.*  
*[emphases added]*

In addition to the provision allowing the submission of information documents observers can submit Opening Statements as well:

*Q. Commission documents*

*3. Observers admitted under Rule of Procedure C.1.(a) and (b) may submit Opening Statements which will be included in the official documentation of the Biennial or other Meeting concerned. They shall be presented in the format and the quantities determined by the Secretariat for meeting documentation.*

*The content of the Opening Statements shall be relevant to matters under consideration by the Commission, and shall be in the form of views and comments made to the Commission in general rather than directed to any individual or group of Contracting Governments.*

*4. All meeting documents shall be included in the Commission's archives in the form in which they were considered at the meeting. All such documents dating from 2011 onwards, and also earlier years where feasible, shall be archived on the Commission's public web site in an accessible fashion by year and category of document.*

Under the *Rules of Debate*, as with the CAMLR Commission Rules, observers can only speak if called upon, and if there is time, after Commissioners have spoken to the agenda:

*A. Right to Speak*

*1. The Chair shall call upon speakers in the order in which they signify their desire to speak, with the exception of accredited Observers, which should be allowed to speak only after all Commissioners desiring to speak do so. As a general rule, Observers will only be allowed to speak once at each Agenda item under discussion, and at the discretion of the Chair.*

2. A Commissioner or Observer may speak only if called upon by the Chair, who may call a speaker to order if his/her remarks are not relevant to the subject under discussion.

3. A speaker shall not be interrupted except on a point of order. He/she may, however, with the permission of the Chair, give way during his/her speech to allow any other Commissioner to request elucidation on a particular point in that speech.

While the 2014 amendments (**bolded** in the text above, and in the *Whaling Commission Rules of Procedure*) have significantly increased the capacity for observers to engage with the Commission and its agenda, it is also clear that there is little to no connection between the *Whaling Commission Rules of Procedure* and *Rules of Debate* and the *Whaling Convention*. The following sections expand on this in relation to the object and purpose.

#### 4.5.7 Document submission in the Whaling Commission

The document submission rules for the Whaling Commission are contained in the *Rules of Debate* Q.3 and the *Rules of Procedure* C.3.

The document submission rules for observers, post-1979 but pre-2014, were restricted under Rule Q.3 to the submission of Opening Statements. The format and quantities of these were to be determined by the Secretariat. Prior to 1979, Opening Statements were recorded in the verbatim record of meetings, but not maintained in the same way as Opening Statements from 1980 onwards, as required by Rule Q.3.

The two relevant controls for Opening Statements require that the content be ‘relevant to matters under consideration by the Commission’ and be directed ‘to the Commission in general rather than directed to any individual or group of Contracting Governments.’ Only the first connects the Opening Statements to the *Whaling Convention*. The latter is a matter of form and courtesy.

Matters that are under consideration by the Commission are, by their nature, related to the work of the Commission, which is in most part determined by the *Whaling Convention*. This does not hold true entirely, however. For example, the agenda item for the Voluntary Fund for Small Cetaceans is not an accepted part of the *Whaling Convention* mandate by the Whaling Commission as a whole. Opening Statements may address the Voluntary Fund as a matter under consideration, but it does not address the object and purpose of the *Whaling Convention*.

Rule Q.3 makes no specific mention of the object and purpose of the *Whaling Convention* or bears any clear relationship to Article IV. It permits a variety of contributions on Commission work. It is open to being interpreted so broadly as to include any topic that might relate generally to whales, such as when Opening Statements were oral, and James Taylor represented a group of environmental NGOs in the giving of Opening Statements and sang a conservation song to the Commission.<sup>397</sup> Without clear reference to expectations on the nature of contributions from observers, there is no official capacity to moderate content.

When considered in conjunction with Article IV of the *Whaling Convention*, which stipulates Commission collaboration with or through other parties as the basis of the engagement of those other parties, Rule Q.3 can be seen as a broad interpretation of the terms of Article IV. Nor are there any connections between the heads of engagements stipulated in Article IV, which are:

- (a) encourage, recommend, or if necessary, organize studies and investigations relating to whales and whaling;*
- (b) collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon;*
- (c) study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.*

None of these terms are engaged in Rule Q.3 to restrict the contributions of observers. There is, in fact, very little apparent connection between observer rule Q.3 and Article IV of the *Convention*, let alone the object and purpose.

This non-connection is also evident in the amended Rule C.3 that simply requires that documents be information documents, submitted 48 hours before the session, and authored, endorsed and full responsibility for their contents claimed by the submitting and accredited organization. Rule C.3 lacks even the caveat that the information documents be on matters under consideration by the Commission or its subsidiary bodies. While functional interpretation would require it, its absence is another missed connection between the *Whaling Convention* and its governing meeting rules.

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<sup>397</sup> Thirty-First Annual Meeting of the IWC, *Verbatim Records*, 1979, Resource ID 421, 13-16.



#### 4.5.8 Speaking rights in the Whaling Commission

The governing rules on speaking rights are contained in the *Rules of Procedure* at C.3 and the *Rules of Debate* at Rule A. Rule C.3 refers the speaking rights of observers to the *Rules of Debate*, so it is Rule A that must be scrutinised.

Rule A is a general rule that applies to all speakers in Commission and subsidiary body meetings. The fundamental hierarchy of international law is enforced, requiring that observers only speak after all Commissioners have spoken. A further caveat is that to each Agenda item under discussion only one observer may speak. This has resulted, in two years of the Rule's operation, in the possibility for two observers to speak, from each side of the floor: anti-whaling and pro-whaling being the two sides.<sup>398</sup>

Aside from enforcing the hierarchy of the Commission, and perhaps reflecting a strong historical memory of what happened when speaking rights were unchecked by numbers, Rule A.1 does not engage with treaty-based tempering of observer speaking rights. Rule A.2, which applies to both Commissioners and observers, requires that the remarks addressed on the agenda item be relevant to the subject under discussion. This is certainly useful in maintaining order in a meeting, but it does little to address the terms of Article IV of the *Whaling Convention*.

Fundamentally, the same analysis of document submission holds for speaking rights, and that gives no treaty-based form to the engagement of observers to the Commission.

#### 4.5.9 Intersessional roles

The *Whaling Convention*, the *Rules of Procedure* and *Rules of Debate* do not circumscribe intersessional roles of NGOs. Intersessionally, accredited NGO observers are simply NGOs, and so they may engage in a variety of domestic relationships that fall outside the direct sphere of the Commissions. However, there are intersessional roles, such as

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<sup>398</sup> IWC 65<sup>th</sup> Annual Meeting of October 2014, 'Annual Report of the International Whaling Commission 2014 – covering the period July 2012 – October 2014 (65<sup>th</sup>)' (Portorož, Slovenia, adopted October 2014) 12 (agenda item 5: sanctuaries) where the NGO, IWMC World Conservation Trust spoke in opposition to the proposed Sanctuaries, and the NGO, Instituto de Conservación de Ballenas de Argentina spoke in support of the proposed sanctuary; Two NGOs, *Intervention on Aboriginal Subsistence Whaling* (Agenda item 7) observed by candidate at the IWC66 meeting (IWC66, Portorož, Slovenia, 26 October 2016), also observed by candidate at the IWC66 meeting (Portorož, Slovenia, 26 October 2016).

Commission associated workshops, but there is also *ad hoc* support or enforcement of conservation measures, through supporting the Secretariat in data collection, and in communication with Commission members.

The *Rules of Procedure* and *Rules of Debate* do not address intersessional behaviour for observers, as the *Rules* are for Commission meetings only. Nor is there any guidance in the *Rules* on how the Whaling Commission may engage with NGOs. The terms of Article IV, so clearly requiring collaboration or delegation from the Commission to other bodies, are not facilitated in the *Rules*. However, this does not mean that the Commission cannot engage under the terms of Article IV in the intersessional period with NGOs. There is no evidence, however, that the Commission has done so.

Despite this, Sea Shepherd has clearly engaged intersessionally with the work of the Commission, through the protests and direct action against the JARPA-II whaling vessels in the Southern Ocean. While the purported legal basis upon which Sea Shepherd fronted these seasonal and yearly actions is explored later, the fundamentally subversive nature of the engagement of Sea Shepherd against the JARPA-II vessels is important to note here. In terms of the object and purpose of the *Whaling Convention*, and the authority of the Whaling Commission itself, the actions of Sea Shepherd undermined the full range of considerations within the object and purpose, as well as the credibility of the Whaling Commission as an organization.

#### 4.6 Discussion

Interpretation in light with the object and purpose, of the non-state actor provisions of each Convention, is incomplete if the substantive outcome of these provisions is not considered. The substantive outcome is most commonly the observer role. A supportive, cooperative relationship between both Commissions and non-state actors is clearly indicated by the terms of both the *CAMLR* and *Whaling Conventions*' Articles. In Article XXIII.3 of the *CAMLR Convention*, the phrase 'co-operative working relationships, as appropriate ... which could contribute to their work' connects Article XXIII.3 to the object and purpose through 'their work', as the work of the Commission is subject to Article II and the object and purpose outside of Article II. Article IV of the *Whaling Convention* similarly expresses a connection to the object and purpose principles, as the sub paragraphs each denote consideration of scientific engagement with whaling, whale

conservation and population increase – all of which reflect the use, conservation, common future, and scientific aspects of the object and purpose.

How the Articles are carried out in effect depends on the working processes of the Commissions. The *CAMLR Convention* Article XXIII has clear directions about the position of observers in terms of the role's capacity, the application for observer status, and Article XXIII itself. There is the Article XXIII requirement that a cooperative working relationship based in the capacity to make contributions to the work of the Commission appropriately defines the role of observer. This has been Commission practice since the first meeting of the CAMLR Commission. The *CAMLR Commission Rules of Procedure* and the deliberative processes of the CAMLR Commission reflect an expectation of support and cooperation from observers and NGOs. The Whaling Commission and its *Convention* have come to a position where the terms of the *Whaling Commission Rules of Procedure* and the *Whaling Commission Rules of Debate* clearly connect the work of the Commission with the position of observer but without expectation of supportive or cooperative content.

In light of these observations, it is important to test the boundaries of NGO observer engagement with reference to the object and purpose principles of each Convention. In testing these boundaries, the central question is whether observers indicate consideration of the object and purpose principles. The case studies and general history of both Commissions will test this question. In light of the *Rules of Procedure* and practice of the Commissions, do NGO observers and intersessional NGO actors reflect consideration of object and purpose principles? Do observer NGOs evince a commitment to the cooperative, and fundamentally subordinate, position given to NGOs under Article IV of the *Whaling Convention* and Article XXIII of the *CAMLR Convention*?

#### 4.7 Conclusion

This chapter set the framework for understanding the roles of NGOs within the CAMLR and Whaling Commissions, in relation to the object and purpose principles and legal regimes of the *Whaling* and *CAMLR Conventions*. The chapter proposed a definition of NGO for the purposes of clarity of analysis of this subset of civil society.

NGO-types are comprised of voluntary membership of citizens or organizations. Membership of governments from one or several states does not prevent an

organization being defined as an NGO, but exclusive membership of states would do so. NGOs are most often supported by member donations, but government grants, philanthropic donations or endowments, and industry funding can also support NGOs. NGOs are organizations that are not-for-profit, driven by a common interest, task, or concern that seeks to achieve the purposes of that organization, and those ends present an independent voice from government policy, even if they parallel government policy.

The roles available to observer NGOs are explored in Chapters Five, Six and Seven, which look at the specific circumstances of NGO engagement. The following Chapters consider the degree to which NGO behaviours, as observers and intersessional actors reflect engagement with the object and purpose principles of the two conventions. If NGOs do engage with Commissions in support of object and purpose principles, the extent of this support is considered in the context of the Commissions and member states.

## Chapter 5: NGOs as observers in the Whaling and CAMLR Commissions

### 5.1 Introduction

Chapter Four narrowed the focus of ‘NGO’ to specific types of organizations within the non-state actor category. NGOs are incorporated as not-for profit in one or more jurisdictions, are aligned with private interests independent of government, comprised of voluntary members, and manifest a distinct purpose. Chapter Four also defined the observer position with reference to interpretative rules under the *Vienna Convention*, the *Conventions*, *Rules of Procedure* and other documents. This chapter is the first of three chapters to apply the object and purpose analysis framework. It relies on the object and purpose interpretation of Chapter Three and the definitions of Chapter Four to analyze the behaviours of NGOs as observers. This chapter also evaluates the admissions processes for observer attendance, considering how Commission and Secretariat practice may affect the engagement of NGOs. This is performed through an object and purpose analysis of the admissions processes.

As explained in Chapter Four, the *CAMLR* and *Whaling Conventions* provide means for Commissions to engage with non-state actors. The *CAMLR Convention* makes specific reference to the development of co-operative relationships with non-state actors, including NGOs, in pursuing the work of the Commission and the objectives and principles of Article II.<sup>399</sup> Similarly, Article IV of the *Whaling Convention* makes provision for relationships between the Commission and public and private actors, of which NGOs fall into the latter. These relationships are strictly confined to cooperative or delegated relationships restricted to research on whales, whaling, the status of stocks, and the potential for increasing stocks of whales.<sup>400</sup> The observer position is not specifically described in either Convention, although it is fleshed out more fully in *Rules of Procedure and Debate*.

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<sup>399</sup> *CAMLR Convention*, Article XXIII(3) and (4).

<sup>400</sup> *Whaling Convention*, Article IV(1).

The reasons for considering NGO contributions to international organizations as significant were outlined in Chapter Four. This chapter looks specifically at contributions of NGOs in the position of observers at Commission meetings. This chapter will explore the NGO admittance processes in the CAMLR and Whaling Commissions; and the nature of their acknowledgement of the object and purpose principles of the *CAMLR Convention* and *Whaling Convention* in oral and written contributions to each Commission. How and if NGOs adhere to object and purpose principles is considered with reference to the object and purpose principles of the Commissions' respective Convention, *Rules of Procedure* and *Rules of Debate, Code of Conduct*, and the practices of the Secretariats in relation to NGOs.

The admissions process demonstrates the extent to which the object and purpose informs the expectations of Commissions on NGOs in their engagement. The state and institutional responses to NGO observer conduct in meetings also illustrate Commission approaches to their legal mandates. This chapter reveals that where the Commission expects NGOs to refer to the Convention's object and purpose in their admission applications, submissions and behaviours, the Commission itself is also more likely to engage in effective decision-making according to its mandate. Conversely, where expectations about NGOs being guided by object and purpose principles are low, the Commission is conflicted over the nature of its legal mandate.

In this chapter, analysis of NGO contributions in both Commissions demonstrates that scientific, industrial and hybrid NGOs generally present broad consideration of most or all object and purpose principles in their role as observers. Environmental NGOs are the most likely to act in a manner that overlooks the use principle of a Convention, both in the Whaling and CAMLR Commissions. The NGO category into which an NGO falls<sup>401</sup> may indicate the probability of consideration of the object and purpose.

This chapter is presented in three parts. Part 5.2 considers the observer application process itself in the early years of the CAMLR Commission, and for the Whaling Commission across its history at significant points in time where rules and practices have changed. This is significant in understanding how the object and purpose has guided the Commissions in inviting observers to participate in Commission meetings.

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<sup>401</sup> See above at Chapter 4 [4.3.4].

Part 5.3 illustrates parallels between early engagement and later Commission standards applied to NGOs. The early roles and engagement of NGOs are discussed in this context with reference to the administrative structures of the *Rules of Procedure* and *Rules of Debate*. The behaviours of NGOs are explored primarily through meeting records. The *Code of Conduct* is considered in its role as a tool for ensuring decorous behaviour during meeting times, and its effectiveness in steering observers toward object and purpose adherence.

The discussion and conclusion at Part 5.4 summarise the Commission approaches that have most influenced NGO behaviours, and how these may be tailored or supported to better align NGO engagement with the object and purpose of the two Conventions. This discussion forms the backbone of Chapter Eight in which recommendations are made for future NGO engagement in the Whaling and CAMLR Commissions. The strengths and weaknesses of Commission–NGO relationships identified in this chapter are further highlighted through the in-depth case studies on regulatory powers and protected areas in Chapters Six and Seven.

## 5.2 Observer admittance and the object and purpose

This section relates to observer application processes and the terms of admission for observers at the Commissions. In the CAMLR Commission, the period of evaluation of application and admittance extends from 1982 – 1989 and is marked by the attendance of the IUCN in 1982, the Scientific Committee for Antarctic Research (SCAR) in 1983, and by extensive correspondence on the admittance of the Antarctic and Southern Ocean Coalition (ASOC) from 1983 to 1989.

In the Whaling Commission there are several significant years and periods of engagement with observer admissions. In 1963, the first attendance of an NGO sets the scene for the continued engagement of NGOs. The first year in which observers made oral Opening Statements was 1967, while 1979 saw a change in Opening Statements to a written form. In 2005 a discussion of the place of NGOs in the Whaling Commission was conducted and in 2014 changes were made to the *Rules of Procedure* to allow observers agenda-based speaking rights, and the capacity to submit information documents to the Commission.

There is a contrast between the approaches of the Commissions in their early years. The CAMLR Commission written record contains extensive evidence of the strictness with which the Commission and its member states approached NGO engagement in the early years, with annual meetings and intersessional correspondence engaging thoroughly with the interpretation and application of the *CAMLR Convention* to the Commission–NGO relationship.<sup>402</sup> The early years of the relationship between the Whaling Commission and NGOs demonstrate significant tolerance on the part of Commission members for a wide variety of NGO views. These differences arguably continue in NGO behaviour and Commission practice.

### 5.3.1 CAMLR Commission on observer admission

The observer accreditation process of the CAMLR Commission is clearly reflective of the object and purpose principles of the *CAMLR Convention*. Non-state actors and NGOs applying for observer status to attend plenary Commission meetings must satisfy the requirements of Article XXIII of the *Convention*.<sup>403</sup> This sets out that the relationship between NGOs and the Commission needs to be ‘co-operative’ and of a nature ‘which could contribute to [the Commission’s] work.’<sup>404</sup>

Hybrid and scientific NGOs – the IUCN, SCAR and SCOR<sup>405</sup> – whose purposes and histories clearly and closely align with the principles of the *CAMLR Convention*, were invited observers from 1982. There was no application process for any of these NGOs. By contrast, environmental NGOs – ASOC and Greenpeace – whose interests and history

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<sup>402</sup> CCAMLR Secretariat, *Cooperation with other organizations ASOC and Greenpeace – observer status* CCAMLR-III/11 (1984); CCAMLR Secretariat, *Requests for observer status by ASOC and Greenpeace International* CCAMLR-IV/10 (1985); CCAMLR Secretariat, *Request for observer status by Antarctic and Southern Ocean Coalition (ASOC)* CCAMLR-V/08 (1986); CCAMLR Secretariat, *Report of informal group of CCAMLR members dealing with the application for observer status by ASOC and Greenpeace* CCAMLR-V/20 (1986); CCAMLR Secretariat, *Applications of ASOC and Greenpeace International for observer status at the 1987 CCAMLR meeting* CCAMLR-VI/BG/07 (1987); Chairman of the Commission, *Invitation to ASOC from the Chairman of the Commission* CCAMLR-VII/14 (1988).

<sup>403</sup> *CAMLR Convention*, Article XXIII.3.

<sup>404</sup> *CAMLR Convention*, Article XXIII.

<sup>405</sup> SCOR is not discussed further as their input has been minimal and aligned with the SCAR submissions.



were less clear to the Commission, had their applications for observer status closely scrutinised. Firm conditions for attendance were applied, reflecting the object and purpose concerns of the Commission in its relationships with these NGOs.<sup>406</sup> Subsequent applicants – COLTO and ARK – received no such attention, indicating that their applications for invitations as observers met the standard set by the CAMLR Commission.<sup>407</sup>

Part VI of the *CAMLR Commission Rules of Procedure* contains rules governing observer invitations, notification and conduct at meetings of the Commission and its bodies.<sup>408</sup> Rule 30 stipulates that the Commission may extend observer invitations to organizations, including NGOs. This is subject to voting requirements under the *CAMLR Convention* Article XII.<sup>409</sup> Commission practice is that for an invitation to be extended, consensus among Commission members is required as observer applications are considered a substantive matter.<sup>410</sup> Further, Rule 30 provides that invitations to NGOs are through the requirements of Article XXIII.3. This requirement preserves the relationship between the Commission and NGO observers as a cooperative relationship.

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<sup>406</sup> *CCAMLR-VII Meeting of 24 October – 4 November 1988*, 'Report of the Seventh Meeting of the Commission' (Hobart, Australia, adopted 4 November 1988) [153] – [154].

<sup>407</sup> Letter from Mr Martin Exel, COLTO to Dr Denzil Miller, CCAMLR Executive Secretary, 5<sup>th</sup> September 2003, COMM CIRC 03/72; *Request by the Coalition of Legal Toothfish Operators (COLTO) for Observer Status at CCAMLR-XXII* COMM CIRC 03/72 (10 September 2003); *Request by the Coalition of Legal Toothfish Operators (COLTO) for Observer Status at CCAMLR-XXII* COMM CIRC 03/79 (3 October 2003); *COLTO Observer Status at CCAMLR-XXIII* COMM CIRC 04/59 (28 June 2004); *Invitation to COLTO to Attend CCAMLR-XXIII as an Observer* COMM CIRC 04/71 (2 August 2004); Letter from Sigve Nordrum, ARK Secretary to Mr Andrew Wright, CCAMLR Executive Secretary, 5<sup>th</sup> October 2011 COMM CIRC 04/71; *Request for Observer Status at CCAMLR-XXX and SC-CAMLR-XXX* COMM CIRC 11/98; SC CIRC 11/47 (7 October 2011).

<sup>408</sup> There is a substantially similar set of rules for the observers admitted to the Scientific Committee meetings. One additional requirement for observation of Scientific Committee meetings is the possession by observer delegates of appropriate scientific qualifications: *CCAMLR Scientific Committee Rules of Procedure*, Rule 19.

<sup>409</sup> *CCAMLR Commission Rules of Procedure*, Rule 30.

<sup>410</sup> *CCAMLR-VI Meeting of 26 October – 6 November 1987*, 'Report of the Sixth Meeting of the Commission' (Hobart, Australia, adopted 6 November 1987) [126-127] indicating the Commission took the admission of observers as a matter of substance requiring consensus.

It also ensures that NGOs contribute to the Commission's work. This is clearly tied to object and purpose principles, as all Commission work is undertaken with reference to use and conservation in Article II of the *CAMLR Convention*.

The attendance of different types of NGOs followed a gradual progression under these rules. Hybrid NGO – IUCN – attended CAMLR Commission meetings from 1982. The scientific NGOs – SCAR and SCOR – attended from 1983 and 1984 respectively. The environmental NGO – ASOC – was admitted as an observer in 1988, and the industry NGOs – COLTO and ARK – were welcomed in 2003 and 2012 respectively.<sup>411</sup>

Two applicant environmental NGOs, Greenpeace and ASOC, applied for observer status with the CAMLR Commission in 1983. This generated significant communication and debate during plenary sessions of the CAMLR Commission<sup>412</sup> and intersessionally.<sup>413</sup> Greenpeace had its application firmly rejected on a number of occasions on the basis of its membership of ASOC,<sup>414</sup> but the Commission continued to consider ASOC's application for observer status.

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<sup>411</sup> *Invitation to COLTO to Attend CCAMLR-XXIII as an Observer* COMM CIRC 04/71 (2 August 2004); *CCAMLR-XXX Meeting of 24 October – 4 November 2011*, 'Report of the Thirtieth Meeting of the Commission' (Hobart, Australia, adopted 4 November 2011) [17.4].

<sup>412</sup> *CCAMLR-II Meeting of 29 August – 9 September, 1983*, 'Report of the Second Meeting of the Commission' (Hobart, Australia, adopted 9 September, 1983) [43]; *CCAMLR-III Meeting of 3 – 14 September 1984*, 'Report of the Third Meeting of the Commission' (Hobart, Australia, adopted 14 September 1984) [54] – [61]; *CCAMLR-IV Meeting of 2 – 13 September, 1985*, 'Report of the Fourth Meeting of the Commission' (Hobart, Australia, adopted 13 September 1985) [48] – [51]; *CCAMLR-V Meeting of 8 – 19 September, 1986*, 'Report of the Fifth Meeting of the Commission' (Hobart, Australia, adopted 19 September 1986) [79] – [83]; *CCAMLR-VI Meeting of 26 October – 6 November 1987*, 'Report of the Sixth Meeting of the Commission' (Hobart, Australia, adopted 6 November 1987) [126] – [127].

<sup>413</sup> For example: Letter from CCAMLR Executive Secretary to David McTaggart, Chairman of Greenpeace International, 23<sup>rd</sup> September 1985, CCAMLR-V/8, 1.

<sup>414</sup> Letter from CCAMLR Executive Secretary to David McTaggart, Chairman of Greenpeace International, 10<sup>th</sup> October 1984, CCAMLR-IV-10, 1; Letter from CCAMLR Executive Secretary to David McTaggart, Chairman of Greenpeace International, 23<sup>rd</sup> September 1985, CCAMLR-V-08; *CCAMLR-IX Meeting of 22 October – 2 November 1990*, 'Report of the Ninth Meeting of the Commission' (Hobart, Australia, adopted 2 November 1990) [15.3]-[15.8].

There is some evidence in the deliberation process that the Commission was concerned to ensure institutional cooperation and deter political agitation of environmental NGOs.<sup>415</sup> The six-year delay between the ASOC application for observer status in 1983 and approval in 1988<sup>416</sup> has connections to the Whaling Commission experiences of NGO behaviours, however no official documentation indicates a direct consideration of this point in the CAMLR Commission. Two interviewees indicated that Japan, a member of both Commissions, was hostile to the presence of NGOs in the CAMLR Commission.<sup>417</sup> This supports the possibility of a connection between the Whaling Commission NGO experience and the delay in the CAMLR Commission approval, as the Japanese delegation was the target of NGO agitation on the commercial whaling moratorium.<sup>418</sup>

The Commission required ASOC to demonstrate compliance with domestic legal requirements to operate under a Constitution, and so indicate purpose and accountability.<sup>419</sup> ASOC eventually complied and demonstrated that it would operate in fundamental accord with the Article II aims of the *CAMLR Convention*.<sup>420</sup> It was invited, on an *ad hoc* basis, to observe the 1988 plenary meetings of CCAMLR-VII.<sup>421</sup>

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<sup>415</sup> CCAMLR-VII Meeting of 24 October – 4 November 1988, 'Report of the Seventh Meeting of the Commission' (Hobart, Australia, adopted 4 November 1988) [153] – [154].

<sup>416</sup> CCAMLR Secretariat, *Cooperation with other organizations ASOC and Greenpeace – observer status 1984* CCAMLR-III/11.

<sup>417</sup> Interview with Interviewee 11 (2 November 2015); Interview with Interviewee 4 (30 October 2014).

<sup>418</sup> For example, one interviewee recalled they and some NGO representatives blocked the hotel hallway of the Japanese delegation with plastic inflatable whales, preventing the delegation from accessing the elevators to attend the meeting: Interview with Interviewee 6 (15 September 2014).

<sup>419</sup> CCAMLR Secretariat, *Report of informal group of CCAMLR members dealing with the application for observer status by ASOC and Greenpeace* CCAMLR-V/20, 3.

<sup>420</sup> CCAMLR-II Meeting of 29 August – 9 September, 1983, 'Report of the Second Meeting of the Commission' (Hobart, Australia, adopted 9 September, 1983) 10-11; CCAMLR Secretariat, *Cooperation with Other Organizations: ASOC and Greenpeace – Observer Status 1984* CCAMLR-III/11, 1; Letter from CCAMLR Executive Secretary to David McTaggart, Chairman of Greenpeace international, 10<sup>th</sup> October 1984, CCAMLR-IV-10; CCAMLR Secretariat, *Request for observer status by Antarctic and Southern Ocean Coalition (ASOC)* CCAMLR-V/08, 2; CCAMLR Secretariat, *Report of informal*

The Commission effectively set the object and purpose of the *CAMLR Convention* as the standard by which the application and admittance of NGO observers were to be judged. This is evidenced by the terms of admittance expressed to ASOC in their correspondence with the Secretariat, as well as in the content of applications by other NGOs.<sup>422</sup> This initial lengthy process also set a standard that no subsequent applicant has failed to address in its initial application. By the time COLTO in 2002 and ARK in 2012 applied, both industry NGOs clearly and directly articulated organizational aims that supported the object and purpose of the *Convention*.<sup>423</sup> There has been no discussion of the granting of observer status for COLTO or ARK in the Commission meeting reports, as these organizations have satisfied the Commission criteria established through initial engagement with ASOC.<sup>424</sup>

### 5.3.2 Trends in admissions and attendance behaviours in the CAMLR Commission

In the CAMLR Commission, there has been a steady growth in the number of delegates sent by COLTO and ASOC to attend meetings. While there are clear expectations for NGOs to demonstrate a capacity to contribute to Commission work, Commission silence

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group of CCAMLR members dealing with the application for observer status by ASOC and Greenpeace CCAMLR-V/20 [4]; Letter from CCAMLR Executive Secretary to Michael Kennedy, Co-ordinator ASOC, 10 October, 1984, CCAMLR-IV-10, 2; CCAMLR Secretariat, Applications of ASOC and Greenpeace international for observer status at the 1987 CCAMLR meeting CCAMLR-VI/BG/07 [7] – [10].

<sup>421</sup> *CCAMLR-VII Meeting of 24 October – 4 November 1988*, 'Report of the Seventh Meeting of the Commission' (Hobart, Australia, adopted 4 November 1988) [153] – [156].

<sup>422</sup> Letter from CCAMLR Executive Secretary to Michael Kennedy, Co-ordinator ASOC, 10 October, 1984, CCAMLR-IV-10 (1986); CCAMLR Secretariat, *Request for observer status by Antarctic and Southern Ocean Coalition (ASOC)* CCAMLR-V/08 (1987); CAMLR Commission Chairman, *Invitation to ASOC from the Chairman of the Commission* CCAMLR-VII/14 (1989); Letter from Mr Martin Exel, COLTO to Dr Denzil Miller, CCAMLR Executive Secretary, 5<sup>th</sup> September 2003, COMM CIRC 03/72; Letter from Sigve Nordrum, ARK Secretary to Mr Andrew Wright, CCAMLR Executive Secretary, 5<sup>th</sup> October 2011 COMM CIRC 04/71.

<sup>423</sup> Letter from Mr Martin Exel, COLTO to Dr Denzil Miller, CCAMLR Executive Secretary, 5<sup>th</sup> September 2003, COMM CIRC 03/72; Letter from Sigve Nordrum, ARK Secretary to Mr Andrew Wright, CCAMLR Executive Secretary, 5<sup>th</sup> October 2011 COMM CIRC 04/71.

<sup>424</sup> Letter from Mr Martin Exel, COLTO to Dr Denzil Miller, CCAMLR Executive Secretary, 5<sup>th</sup> September 2003, COMM CIRC 03/72; Letter from Sigve Nordrum, ARK Secretary to Mr Andrew Wright, CCAMLR Executive Secretary, 5<sup>th</sup> October 2011 COMM CIRC 04/71.

on observer delegation numbers has seen NGOs increase their delegation numbers, where previously delegations were restricted to single observers.<sup>425</sup>

Meeting records show that delegations contain a diversity of umbrella NGO representatives from within the environmental and industry lobbies. This indicates that despite the early intentions of the CAMLR Commission to limit the number of observers to single delegates for each umbrella organizations, the umbrella organizations themselves exploit the silence of the Commission on observer numbers to have multiple representatives from within their membership in attendance. An issue with this is that these organizations may not, on their own, satisfy the Commission of their intentions regarding the *CAMLR Convention* object and purpose principles. In fact, Greenpeace, as a member of ASOC clearly fits this characterisation.

A growth in observer delegate numbers diminishes the control of the Commission over the interpretation of their proceedings by outside parties. It has previously exposed the Commission to an unwanted breach of confidentiality by such a party.<sup>426</sup> However, as is observable, SCAR and the IUCN have remained consistent in sending low numbers of delegates, rather than taking advantage of the creeping silence of the Commission to saturate the meeting with delegates.

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<sup>425</sup> *CCAMLR-VII Meeting of 24 October – 4 November 1988*, 'Report of the Seventh Meeting of the Commission' (Hobart, Australia, adopted 4 November 1988) [153].

<sup>426</sup> *CCAMLR-XVII Meeting of 26 October – 6 November 1998*, 'Report of the Seventeenth Meeting of the Commission' (Hobart, Australia, adopted 6 November 1998) [12.22 – 12.28].

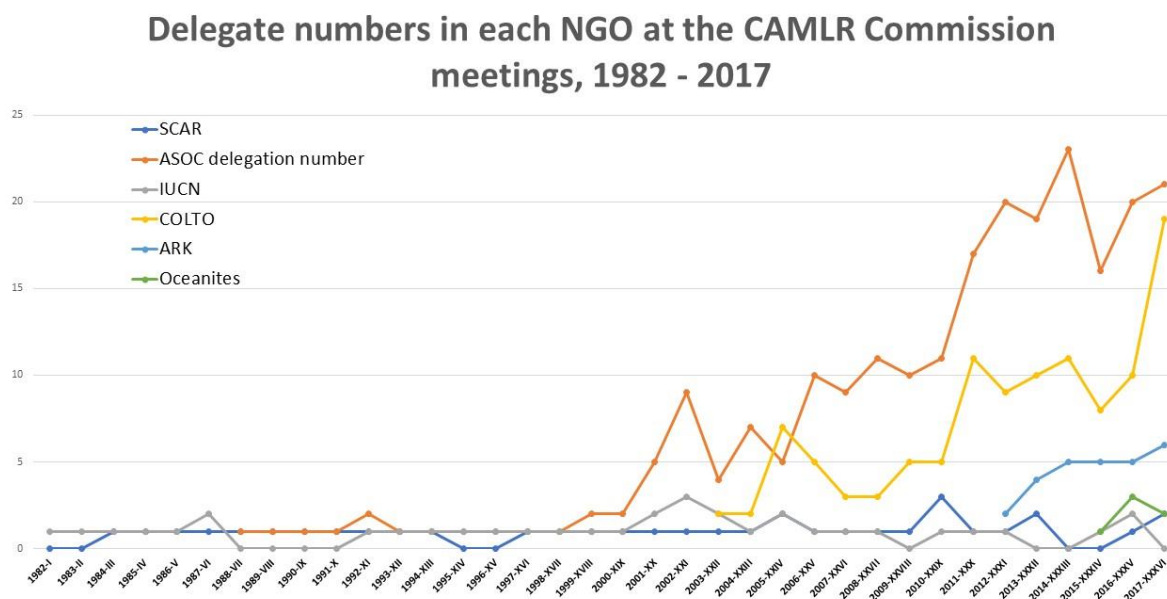


Figure 5.1 Delegates per NGO observer at the CAMLR Commission meetings, 1982-2017

The cause of this growth is unknown. In interview, delegates were not candid about this development. However, there are issues in uncontrolled delegation numbers, both in terms of practicality – the size of the CCAMLR Secretariat building is small, but also in terms of confidentiality and adherence to object and purpose principles. In Chapter Eight, it is suggested that the Commission implement observer fees, and set a maximum delegation size.

### 5.3.3 The Whaling Commission on observer admission

Admission rules in the Whaling Commission have gone through several stages. There have been three significant admission events in the course of Whaling Commission history that reflect the characters of these periods. Prior to 1980, admission of observers was on an *ad hoc* basis.<sup>427</sup> From 1980 – 2005, the *Whaling Commission Rules of Procedure* contained current administrative requirements that a request for observer status be submitted at least 60 days prior to the next Commission meeting, and that observers remained accredited unless the accreditation was revoked.<sup>428</sup> Grounds for

<sup>427</sup> No meeting records or annexes contain rules for admission of observers.

<sup>428</sup> *Whaling Commission Rules of Procedure* (May 1999) in *IWC 51<sup>st</sup> Annual Meeting of 24<sup>th</sup> – 28<sup>th</sup> May 1999*, 'Fifty-First Annual Report of the International Whaling

revocation are not anywhere codified. This was also indicative of a greater level of seriousness with which NGO engagement was approached, and a concern for ensuring orderly engagement. The third period is post-2012, after the speaking rights and information document amendments, with NGOs being permitted to address the Commission on agenda items. Significant changes in observer practice occurred between 1963 and 1980, however, this section will deal with admissions events first, and then practice-based events.

The first significant admission event in the pre-1980 period was the appearance of environmental NGO, International Society for the Protection of Animals (ISPA) in 1963. The attendance of ISPA was not preceded by any plenary discussion, and ISPA was accommodated in the same manner as IGO observers such as the Food and Agriculture Organization (FAO), which was *ad hoc* and informal.<sup>429</sup> There was no controversy and no discussion as the presence of NGOs in international environmental law forums was new.

The second significant admission event was the 1986 banning of Sea Shepherd from ever attending Whaling Commission meetings as an observer. This ban arose from the scuttling by Sea Shepherd of two private whaling vessels in a Reykjavik harbour.<sup>430</sup> No Sea Shepherd representative has ever been granted admission to the meeting as an NGO observer delegate.<sup>431</sup> In the history of the Whaling Commission only one other NGO,

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Commission 1999 – covering the financial year 1998-1999’ (adopted Adelaide, Australia, July 2000) C. Observers 1.b.

<sup>429</sup> *IWC 15<sup>th</sup> Meeting of July 1963*, ‘Fifteenth Report of the International Whaling Commission – covering the fifteenth fiscal year 1963-1964’ (Sandefjord, Norway, adopted 1964) 15; Fifteenth Meeting of the IWC, *Verbatim Records*, 1963, Resource ID 402, 3-4 – the verbatim records indicate an informal written application through letter and a general consideration of the Commission to be the entirety of the admissions process.

<sup>430</sup> Roeschke, above n 383, 107.

<sup>431</sup> Letter from Ms Sarah Hambly, UK Director of Sea Shepherd Conservation Society UK to Dr Ray Gambell, Secretary to the International Whaling Commission, 19 February 1987; Letter from Dr Ray Gambell, Secretary to the International Whaling Commission to Ms Sarah Hambly, UK Director of Sea Shepherd Conservation Society UK, 6 March 1987; Letter from Mr Paul Watson, Sea Shepherd Conservation Society to Mr [sic] Ray Gambell, International Whaling Commission, May 26 1995; Letter from Dr Ray Gambell,

unnamed by the Commission, has had their credentials revoked, for protest actions outside the Secretariat headquarters in the UK.<sup>432</sup> The continued rejection of Sea Shepherd reflects the IWC's concern for maintaining orderly and lawful engagement during Commission meetings.

Another significant event was the failure of the Commission to revoke the observer accreditation of Greenpeace after a high seas confrontation with Japanese whaling vessels in the 1998/1999 Austral summer. Greenpeace boats had acted against Japanese whaling vessels on the high seas. This generated significant discussion in the Commission. Japan alleged that Greenpeace had engaged in illegal and violent actions against their research vessels, resulting in a high seas collision.<sup>433</sup> It sought the revocation of Greenpeace observer credentials. There was no consensus on the revocation of credentials, with several members highlighting the "alleged" nature of Japan's version of the high seas confrontation, and the existence of a different narrative. Without consensus Greenpeace remained an observer.<sup>434</sup>

The significance of the Greenpeace issue lies in the sharp contrast it presents to the previous decision of the Commission to reject Sea Shepherd for observer status. In 1980, failure on the part of NGOs to observe proper behaviour in meetings resulted in the removal of opening statements as an agenda item.<sup>435</sup> In 1986, the scuttling of two

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Secretary to the International Whaling Commission to Mr Paul Watson, Sea Shepherd Conservation Society, 28 May 1995.

<sup>432</sup> *IWC 51<sup>st</sup> Annual Meeting of May 1999, 'Annual Report of the International Whaling Commission 1999 – covering the financial year 1998-1999' (St George's, Grenada, adopted May 1999) 11.*

<sup>433</sup> *IWC 51<sup>st</sup> Annual Meeting of May 1999, 'Annual Report of the International Whaling Commission 1999 – covering the financial year 1998-1999' (St George's, Grenada, adopted May 1999) 11.*

<sup>434</sup> *IWC 51<sup>st</sup> Annual Meeting of May 1999, 'Annual Report of the International Whaling Commission 1999 – covering the financial year 1998-1999' (St George's, Grenada, adopted May 1999) 12.*

<sup>435</sup> *The International Wildlife Coalition, Declaration of Concern for Small Island Nations Being Subjected to Japanese Influence at International Conservation Treaty Deliberations* IWC/50/OS Int Wild Coal (1998) was withdrawn; see also discussion in Chairman's Report of the 50<sup>th</sup> Annual Meeting of the International Whaling Commission (16-20 May 1998, Muscat, Sultanate of Oman) 3, 40 contained in IWC 50<sup>th</sup> Annual Meeting of May



vessels in Icelandic waters resulted in a life ban of Paul Watson from attending Commission meetings. This was reinforced in 1995 when Sea Shepherd as a whole was denied accreditation.<sup>436</sup> But, in 1999, confrontation between a Greenpeace vessel and Japanese whaling vessels on the high seas, which resulted in a vessel collision ended with no revocation of Greenpeace accreditation. This showed a clear divide in the Commission as to what was acceptable conduct for NGOs.

It is possible to argue that the *laissez-faire* approach to the object and purpose of the *Whaling Convention* among a majority of environmental NGOs, unchecked by the Commission, contributed to a growing disregard for the rule of law in both states and observers. By 1999, this had developed to the extent that direct antagonism of a member state by an observer NGO was met with no censure from the broader community of member states in the Commission. However, a broader debate began within the Whaling Commission about the future of the Commission, its observer rules, and the place of observers within it.<sup>437</sup>

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1998, 'Fiftieth Annual Report of the International Whaling Commission 1998 – covering the 1997-98 financial year' (Muscat, Oman, adopted May 1998).

<sup>436</sup> Letter from Ms Sarah Hambly, UK Director of Sea Shepherd Conservation Society UK to Dr Ray Gambell, Secretary to the International Whaling Commission, 19 February 1987; Letter from Dr Ray Gambell, Secretary to the International Whaling Commission to Ms Sarah Hambly, UK Director of Sea Shepherd Conservation Society UK, 6 March 1987; Letter from Mr Paul Watson, Sea Shepherd Conservation Society to Mr [sic] Ray Gambell, International Whaling Commission, May 26 1995; Letter from Dr Ray Gambell, Secretary to the International Whaling Commission to Mr Paul Watson, Sea Shepherd Conservation Society, 28 May 1995; see also *Chairman's Report of the 52<sup>nd</sup> Annual Meeting of the International Whaling Commission* (3-6 July 2000 Adelaide, Australia) 11, 11 in *IWC 52<sup>nd</sup> Annual Meeting of July 2000*, 'Annual Report of the International Whaling Commission 2000 – covering the 1999-2000 financial year' (Adelaide, Australia, adopted July 2000).

<sup>437</sup> Iliff, above n 384; Government of Japan, *Conference for the Normalization of the International Whaling Commission February 13-15, 2007 Tokyo, Japan Chair's Summary* IWC/M08/INFO 2 (2008); Government of New Zealand, *Chair's Summary: Symposium on the State of the Conservation of Whales in the 21<sup>st</sup> Century 26<sup>th</sup> April 2007* IWC/M08/INFO 3 (2008); Government of Argentina, *Buenos Aires Group* IWC/M08/INFO 4 (2008); Buenos Aires Group, *Latin American Cooperation Strategy for the Conservation of Cetaceans* IWC/M08/INFO 7 (2008); Governments of Argentina and the Netherlands, *The Second Pew Whale Symposium, Tokyo, 30-31 January, 2008 Chairman's Summary* IWC/M08/INFO 9 (2008).

In 2005, the Whaling Commission reviewed the observer attendance rules (the old rules) that had prevailed from 1980 – 2005. Several issues with these old rules were identified. One was the standing requirement for NGOs to demonstrate they were ‘international’ in character, with offices or addresses in at least four countries; a requirement that was removed.<sup>438</sup> This requirement fundamentally conflicted with the nature of some NGOs and bodies that would wish to attend, including NGOs representing cultures or industries restricted to a single jurisdiction, for example Japanese cultural whaling associations and Alaska Eskimo representatives..<sup>439</sup> The second was the restriction to one observer per NGO to be permitted in the meeting room at any one time.<sup>440</sup> These restrictions affected the capacity for smaller NGOs to attend meetings.<sup>441</sup>

The international requirement resulted in ‘flag of convenience’ organizations being created to facilitate access for more than one representative from an international NGO to be present in the meeting room.<sup>442</sup> Additional to this, there were issues of providing false addresses to demonstrate an international character, and other positions in the Commission being used as a vehicle for attendance by additional delegates. The Commission noted the use of the interpreter position as one such vehicle.<sup>443</sup> The author has personally seen the use of the media role for the access of a Sea Shepherd member

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<sup>438</sup> Whaling Commission, *Report of the Finance and Administration Committee* IWC/58/rev 2 (Monday 13 June 2006) 24.

<sup>439</sup> Whaling Commission, *Report of the Finance and Administration Committee* IWC/58/rev 2 (Monday 13 June 2006) 24; although it should be noted that the rules were laxly applied in relation to Alaska Eskimo representatives, who despite lacking ‘international’ character attended numerous meetings before the rule change in 2006.

<sup>440</sup> Whaling Commission, *Report of the Finance and Administration Committee* IWC/58/rev 2 (Monday 13 June 2006) 24.

<sup>441</sup> Whaling Commission, *Report of the Finance and Administration Committee* IWC/58/rev 2 (Monday 13 June 2006) [6.2].

<sup>442</sup> Whaling Commission, *Report of the Finance and Administration Committee* IWC/58/rev 2 (Monday 13 June 2006) [6.2]; Australia, Austria, Monaco, the Netherlands, New Zealand, and the United States, *non-governmental organization accreditation and participation in IWC Annual Meetings: a recommended approach* IWC/58/24 Agenda item 23 (19 June 2006) 1.

<sup>443</sup> Whaling Commission, *Report of the Finance and Administration Committee* IWC/58/rev 2 (Monday 13 June 2006) 25.

to Whaling Commission meetings<sup>444</sup> from which the organization is currently banned.<sup>445</sup> So while the instituted reforms of the 2005 review have largely addressed issues of manipulation and misrepresentation, they have not entirely abolished them.

Changes to the rules have not affected how NGOs address the object and purpose. The rule changes are entirely administrative. Additions to the rules include the requirement to provide a letter of accreditation from the institution or organization an applicant intends to represent, and a brief explanation of why the organization wishes to attend.<sup>446</sup> The application process itself does not express any expectations of applicants adhering to or understanding the object and purpose of the Convention, or the work of the Commission beyond an interest in its work. Functionally, this means that an NGO can apply, and will likely be accredited, by simply stating an interest in the work of the Commission, without demonstrating either a capacity to contribute to the its work, or any affinity with the underlying principles of that work.

#### 5.3.4 Trends in admissions and attendance behaviours in the Whaling Commission

The rules of the Commissions affect NGO behaviours. During the 1960s and 1970s, engagement of environmental NGOs through Opening Statements reflected consideration of the object and purpose principles.<sup>447</sup> However, content went unchecked as NGO statements moved further away from the fundamental principles of the *Whaling Convention* toward whatever position was held by the submitting NGO. This has largely prevailed because no rules or processes address this.

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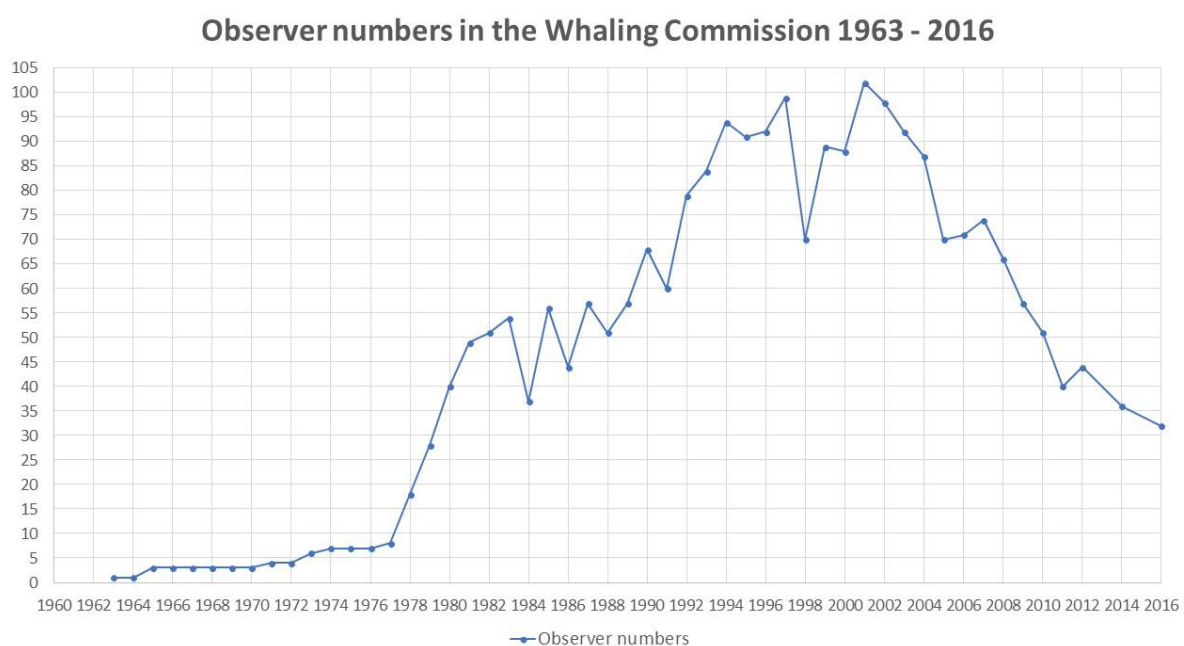
<sup>444</sup> IWC65 and IWC66, a prominent member of Sea Shepherd attended both Commission meetings as a media representative – personal observations and conversations of author.

<sup>445</sup> *IWC 53<sup>rd</sup> Annual Meeting of July 2001*, ‘Annual Report of the International Whaling Commission 2001 – covering the 2000-2001 financial year (53<sup>rd</sup>)’ (London, United Kingdom, adopted July 2001) 4-5; *IWC 58<sup>th</sup> Meeting of June 2006*, ‘Annual Report of the International Whaling Commission 2006 – covering the 2005-2006 financial year’ (St Kitts and Nevis, West Indies, adopted June 2006) 7.

<sup>446</sup> International Whaling Commission, *Observers. Details for Non-Governmental Organizations* (2018) [https://iwc.int/observers\\_ngo](https://iwc.int/observers_ngo).

<sup>447</sup> Eighteenth Meeting of the IWC, *Verbatim Records*, 1966, IWC/18/18, 66 per FPS, IUCN and WWF; Nineteenth Meeting of the IWC, *Verbatim Records*, 1967, IWC/19/14, 73 per WWF; Twentieth Meeting of the IWC, *Verbatim Records*, 1968, IWC/20/12, 46 per FPS and WWF.

The graph below illustrates the course of NGO attendance at the Whaling Commission, from 1963 to 2016. Arguably it demonstrates that rule changes do affect NGO conduct. There is a visible effect from the 2005 rule amendments, with a decrease in the number of NGOs in attendance in response to the capacity to have multiple delegates in the meeting room at one time. There are also several significant events in the Whaling Commission history that can be plotted to fluxes in attendance numbers. Discussion of these points follows. The significance of considering these points is that NGO presence in itself is a form of NGO behaviour. Representation of NGOs that do not acknowledge the object and purpose principles of the *Whaling Convention* can be as significant as their statements and organizational position. It is also significant to note that changes in the Commission rules *do* affect NGO behaviours, and so it is possible to amend rules to encourage greater recognition of object and purpose principles.



*Figure 5.2 Observer NGO (individual organization not delegate) numbers in the Whaling Commission 1963 – 2016*

There are several interesting points to observe on this graph. The first is the sharp increase in observers attending in 1978. The second is the climb in numbers up to 2001. The third is the steady and continued decline in observer NGO numbers that has continued across the 21<sup>st</sup> century. The sharp increase in observer numbers in 1978 is likely attributable to the growing international interest at the time in the proposal for a commercial whaling moratorium, although this is not verifiable except by way of

anecdote.<sup>448</sup> The steady climb in numbers until 2001 can be attributed to the ongoing interest in the Whaling Commission among environmental groups, and to the meeting rule that only one observer per NGO was to be permitted in the meeting room at any one time.<sup>449</sup> The original rule resulted in the attendance of many organizations with a single representative to maximise the number of observers present.

The decline in observer organization numbers can be attributed to two changes in observer admission rules. The first was the abolition of the rule permitting only one observer per NGO in the meeting room at any one time. The second is a financial reason. The Commission website notes that in 2014 the first delegate of an observer organization would be charged at £580 GBP, and each subsequent delegate at £285 GBP.<sup>450</sup> The cost effectiveness of larger numbers of delegates under one banner, rather than many observer organizations with one representative may thus be partially responsible for the declining numbers of organizations represented. The impact of these rule changes can be seen in a comparison of the years 1999, 2001, 2009 and 2011 – two years preceding and two years following the amendments to the admission rules for observers.

	1999	2001	2009	2011
<b>Ratio of NGOs to delegates</b>	88:130	102:154	57:131	40:102
<b>Delegates per NGO</b>	1.5	1.5	2.2	2.5

*Figure 5.3 Ratio of delegates per NGO and average number of delegates per NGO in years before and after rule changes*

The average number of delegates per NGO increased in the years after the changes to admission rules. The removal of the limitation on the number of delegates per organization permitted in the meeting room at any one time, and the financial incentive

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<sup>448</sup> Weyler, above n 264.

<sup>449</sup> Whaling Commission, *Report of the Finance and Administration Committee* IWC/58/rev 2 (Monday 13 June 2006) 24.

<sup>450</sup> International Whaling Commission, *Observers. Details for Non-Governmental Organizations* (2018) [https://iwc.int/observers\\_ngo](https://iwc.int/observers_ngo).

to have multiple delegates per organization is likely to be the cause for the increase in the average number of delegates per NGO. These changes indicate that the Commission can affect NGO behaviour if it wishes to do so. This observation is equally applicable to the CAMLR Commission in relation to its NGO observer delegation sizes.

While there has been significant overhaul of the criteria for admittance in the Whaling Commission there are still no requirements for NGOs to demonstrate a capacity to contribute to the work of the Commission. The *Whaling Commission Rules of Procedure* and *Rules of Debate* show no connection between the observer position, the object and purpose, or the terms of Article IV of the *Whaling Convention*, which requires cooperative delegated engagement by other organizations within a range of research and data contributions.

The *Whaling Commission Rules of Procedure*, Part C.1.b addresses the capacity of NGOs to become accredited as observers at a plenary meeting. The application process only requires applicants to demonstrate an interest in ‘matters covered by the Convention’. An applicant that satisfies this requirement, unless deemed otherwise unsuitable, can seek accreditation as an observer to attend Whaling Commission meetings.<sup>451</sup> Requiring NGOs to express an interest in matters covered by the Convention does not meet the high standard of a demonstrated capacity to contribute to the work of the Commission, nor consideration of the Convention’s object and purpose. Comparing this situation with the CAMLR Commission, there are indications that failure to be clearer in terms under which NGOs may apply has impacted on how NGOs subsequently engage.

If the attendance of NGOs was raised as an issue before the Commission, there is a clear argument available that the phrase ‘matters covered by the Convention’ does not include many issues that are of interest to NGOs, such as small cetaceans and whale watching. This clear absence of overlap between the interests of NGOs in some of the non-Convention work of the Commission and the *Whaling Convention* itself may offer a window through which to restrict access for NGOs.

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<sup>451</sup> International Whaling Commission, *Observers. Details for Non-Governmental Organizations* (2018) [https://iwc.int/observers\\_ngo](https://iwc.int/observers_ngo).

## 5.3 Governing engagement activity of NGO observers

### 5.3.1 CAMLR Commission

The CAMLR Commission requirements for admission of NGO observers has consistently made connections between the terms of Article XXIII, the object and purpose of the *CAMLR Convention* and the application for and admission of observers. Expectations on NGOs to conform to a standard of behaviour reflecting this relationship have been consistently demonstrated in subsequent Commission conduct. Over the course of Commission meetings NGOs have been subject to censure (noted on the meeting record) where member states have disapproved of NGO behaviour, usually related to the content of papers or speeches.

There are several early examples of states indicating their view of appropriate roles for observer participation and effectively curtailing NGO involvement. In 1990, Japan requested that all observers withdraw from the meeting room so a discussion on a specific compliance issue could be carried out among the Contracting Parties only.<sup>452</sup> The basis of this exclusion was the inability of observers to contribute to the diplomatic negotiations among member states on a compliance issue.<sup>453</sup>

In 1995, Chile and Japan rebuked the IUCN representative for stepping outside the role of observer in criticising the Commission for failing ‘to adopt adequate measures’ in relation to IUU.<sup>454</sup> Chile expressed reservations about the observer status of the IUCN<sup>455</sup> after the IUCN representative made significant criticisms of both member state views of international law<sup>456</sup> and the capacity of the Commission to curb IUU fishing.<sup>457</sup> There was also criticism of an ASOC information paper, which made extensive

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<sup>452</sup> *CCAMLR-IX Meeting of 22 October – 2 November 1990*, ‘Report of the Ninth Meeting of the Commission’ (Hobart, Australia, adopted 2 November 1990) Annex 8, [2].

<sup>453</sup> *Ibid* [3].

<sup>454</sup> *CCAMLR-XIV Meeting of 24 October – 3 November 1995*, ‘Report of the Fourteenth Meeting of the Commission’ (Hobart, Australia, adopted 3 November 1995) [14.2] and [14.3].

<sup>455</sup> *Ibid*.

<sup>456</sup> *Ibid* [11.10].

<sup>457</sup> *Ibid* [11.9].

commentary on what ASOC felt were the directions the Commission should take.<sup>458</sup> Japan felt that ASOC should restrict itself to substantive contributions rather than opinions, as policy direction 'more correctly fell within the Commission's area of responsibility.'<sup>459</sup> Chile withdrew its reservations about the involvement of the IUCN as observer<sup>460</sup> the following year, when the IUCN observer acted within the perceived permissible range of the observer role by restricting her commentary to urging the Commission to consider designating a series of protected areas in the Southern Ocean as called upon in resolutions of the IUCN Congress.<sup>461</sup>

States grappled to define appropriate behaviours for observers at the 1998 meeting. The Commission discussed how to address NGOs using inappropriate language, misrepresenting fact, and acting in breach of confidentiality.<sup>462</sup> Japan suggested amending the *CCAMLR Commission Rules of Procedure* to address the issue of a breach of confidentiality that had arisen from a report written by the ASOC-member, ISOFISH, and published on its website.<sup>463</sup> As a direct result, the Commission amended Rule 32.b.<sup>464</sup> Rule 32.b had previously allowed the Commission to restrict access to meeting sessions for NGO and IGO observers. The amendment allowed for selective invitations of non-member state observers where other observers had been excluded.<sup>465</sup>

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<sup>458</sup> ASOC, *Report of the ASOC to the CCAMLR* CCAMLR-XIV/BG/30 (1995).

<sup>459</sup> *CCAMLR-XIV Meeting of 24 October – 3 November 1995*, 'Report of the Fourteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November 1995) [14.3].

<sup>460</sup> *CCAMLR-XV Meeting of 21 October – 1 November 1996*, 'Report of the Fifteenth Meeting of the Commission' (Hobart, Australia, adopted 1 November 1996) [11.14].

<sup>461</sup> *Ibid* [11.13].

<sup>462</sup> *CCAMLR-XVII Meeting of 26 October – 6 November 1998*, 'Report of the Seventeenth Meeting of the Commission' (Hobart, Australia, adopted 6 November 1998) [12.22 – 12.28]; this material is also discussed in Chapter 7 in depth.

<sup>463</sup> *Ibid* [12.29].

<sup>464</sup> *Ibid* [16.2].

<sup>465</sup> *Ibid*.

Rule 32(b)

If a Member of the Commission so requests, sessions of the Commission at which a particular agenda item is under consideration shall be restricted to its Members and Observers referred to in Rule



Such incidents aside, there is significant evidence to justify the view that the relationship between the Commission and observer NGOs, as well as NGO contributions have been largely defined by consideration of the principles of the object and purpose of the *CAMLR Convention*. NGOs from industry, environment, science and a hybrid position have assisted the Commission more often than not.<sup>466</sup> For example, even in the midst of the IUU fishing issues that manifested in the mid-90s, the oral advocacy of ASOC for a zero-catch limit took account of the principles governing the CAMLR Commission's work.<sup>467</sup> Similarly, the IUCN strictly accounted for the object and purpose obligations of the Commission, noting issues of scientific data and the ongoing sustainability of stocks amidst the uncertainty of IUU fishing.<sup>468</sup> Beyond the IUU issue, both the IUCN and ASOC also submitted extensive information papers assisting the work of the Commission. These information papers indicated accord with the underlying principles of the *CAMLR Convention* object and purpose, either through specific reference or by presenting data supportive of decision-making. Indicative of the value arising from adherence to object and purpose consideration is the thanks and appreciation expressed by the Commission

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30(a) and Rule 30(b). With respect to any session so restricted, the Commission may also agree to invite observers referred to in Rule 30(c).

<sup>466</sup> ASOC, *Antarctic and Southern Ocean Coalition Paper on the creation of a CCAMLR enforcement regime* CCAMLR-XVI/BG/38 (1997); ASOC, *The international trade in Patagonian toothfish: international involvement, concerns and recommendations* CCAMLR-XVII/BG/12 (1998); IUCN, *Patagonian toothfish – are conservation and trade measures working?* CCAMLR-XX/BG/28 (2001); ASOC, *ASOC evaluation of CDS* CCAMLR-XX/BG/20 ASOC (2000); ASOC, *Brief update on marine acoustic technology and the Antarctic environment* CCAMLR-XXII/BG/41 (2003); COLTO, *Working together to end illegal, unreported and unregulated fishing in the Southern Ocean* CCAMLR-XXXIII/BG/23 (2014); SCAR/SCOR, *The Southern Ocean Observing System (SOOS): an update* CCAMLR-XXX/BG/13 (2011).

<sup>467</sup> *CCAMLR-XIX Meeting of 23 October – 3 November, 2000*, 'Report of the Nineteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November, 2000) [12.17]; *CCAMLR-XX Meeting of 22 October – 2 November, 2001*, 'Report of the Twentieth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2001) [12.11]; *CCAMLR-XXI Meeting of 21 October – 1 November 2002*, 'Report of the Twenty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2002) [10.30].

<sup>468</sup> *CCAMLR-XIX Meeting of 23 October – 3 November 2000*, 'Report of the Nineteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November 2000) [12.12]; *CCAMLR-XX Meeting of 22 October – 2 November 2001*, 'Report of the Twentieth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2001) [12.12 – 12.14], Annex 5 [2.78].

and individual member states to various observer NGOs for their contributions to the work of the Commission.<sup>469</sup>

Arguably, the positive relationship between Commission and NGOs, and the overall adherence of NGOs to object and purpose arises from the seriousness with which the Commission approached both admittance to the Commission meetings and maintaining standards of conduct among observer NGOs, both during meeting time and intersessionally.

### 5.3.2 Whaling Commission

NGO observers in the Whaling Commission have a complicated history. This section explores NGO engagement with the privileges attached to observer status, noting the level of adherence to the object and purpose principles of the *Whaling Convention*. Key influences on the nature of NGO contributions include: the lack of clarity in the *Whaling Convention* for expectations on non-government actors engaging with the Commission and its members, the absence of expectations in the *Whaling Commission Rules of Procedure and Debate* on the content of written submissions, and the lack of clear parameters for oral submissions post-2012 amendments.

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<sup>469</sup> CCAMLR-XVII Meeting of 26 October – 6 November 1998, 'Report of the Seventeenth Meeting of the Commission' (Hobart, Australia, adopted 6 November 1998) [12.24] New Zealand to ASOC, [12.27] Uruguay on ASOC; CCAMLR-XX Meeting of 22 October – 2 November 2001, 'Report of the Twentieth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2001) [2.82] Chile to IUCN, [2.85] SCIC to ASOC and IUCN; CCAMLR-XXI Meeting of 21 October – 1 November 2002, 'Report of the Twenty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2002) [14.10] UK to ASOC, [14.12] Chile to ASOC; CCAMLR-XXIV Meeting of 24 October – 4 November 2005, 'Report of the Meeting of the Twenty-Fourth Commission' (Hobart, Australia, adopted 4 November 2005) [15.8] Spain to IUCN; CCAMLR-XXVI Meeting of 22 October – 2 November 2007, 'Report of the Twenty-Sixth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2007) [13.74] EC to all NGOs, [16.6] and [16.8] EC and Argentina to ASOC respectively; CCAMLR-XXVIII Meeting of 26 October – 6 November 2009, 'Report of the Twenty-Eight Meeting of the Commission' (Hobart, Australia, adopted 6 November 2009) [16.13] Commission to COLTO; CCAMLR-XXXI Meeting of 23 October – 1 November 2012, 'Report of the Thirty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2012) [9.9] Commission to COLTO and ARK; CCAMLR-XXXII Meeting of 23 October – 1 November 2013, 'Report of the Thirty-Second Meeting of the Commission' (Hobart, Australia, adopted 1 November 2013) [5.90] Commission to ASOC, [9.9] Commission to ASOC, [14.2] US to ASOC; CCAMLR-XXXIII Meeting of 20 – 31 October 2014, 'Report of the Thirty-Third Meeting of the Commission' (Hobart, Australia, adopted 31 October 2014) [9.13] Commission to ASOC.

### *Oral submission of Opening Statements*

There are distinct phases of engagement with observer NGOs across the course of Whaling Commission history; the early years from 1963–1978/9 being the first involving oral representations. Environmental NGOs and the hybrid NGO, IUCN were the only NGO types operating at this stage – the second hybrid NGO in the Whaling Commission, the IWMC WCT did not appear until 1994. Before 1978, environmental NGO oral statements recognized a balance of conservation, use and future generations' use, even from a moratorium position. Mention of science was limited to the IUCN. From 1978, environmental NGO statements began to exclude mention of the lethal use to which whale stocks would be put once they had recovered, no longer accepting the possibility of ongoing lethal takes of whales.

The first oral address to the Commission occurred in 1966 when an observer NGO spoke to the Commission agenda for the first time under Agenda item 18 Other Business.<sup>470</sup> From 1966–1971, observers could address the Whaling Commission at the close of the meeting.<sup>471</sup> At the twenty-fourth meeting in 1972, the Chairman permitted observers 'to speak at an early part of the proceedings instead of at the end as in previous years.'<sup>472</sup> This became the agenda item 'Opening Statements' in which Contracting Governments, non-party governments, IGOs and NGOs expressed their positions on the previous years' and that year's agenda. NGOs were restricted to five minutes speaking time each.<sup>473</sup>

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<sup>470</sup> Eighteenth Meeting of the IWC, *Verbatim Records*, 1966, IWC/18/18, 66 Joint statement of WWF and IUCN, FPS associating itself with the statement; Twenty-Fourth Meeting of the IWC, *Verbatim Records*, 1972, IWC/24/10: The position of observer and member state opening statements moved from 'Other Business' to a separate agenda item 'Opening Statements' in 1972.

<sup>471</sup> For example: Eighteenth Meeting of the IWC, *Verbatim Records: Friday 1<sup>st</sup> July 1966*, IWC/18/18, 65-69; Nineteenth Meeting of the IWC, *Verbatim Records: Friday 30<sup>th</sup> June 1967*, IWC/19/14, 72-73; Twenty-Fifth Meeting of the IWC, *Verbatim Records: Friday 29<sup>th</sup> June 1973*, IWC/25/13, 24-25.

<sup>472</sup> *IWC 24<sup>th</sup> Meeting of June 1972*, 'Twenty-Fourth Report of the International Whaling Commission – covering the 24<sup>th</sup> fiscal year 1972-1973' (London, United Kingdom, adopted June 1973) 22.

<sup>473</sup> Thirtieth Annual Meeting of the IWC, *Verbatim Records: Monday 26<sup>th</sup> June 1978*, Resource ID 419, 44-45.

Statements in the 1966–1979 period were varied in object and purpose content, but aside from one statement made by a trade union, the IUCN and environmental NGOs dominated Commission meetings. In 1967, WWF noted that ‘proper management of the whale stocks could support a healthy industry.’<sup>474</sup> The Fauna Protection Society (FPS) associated itself with this statement.<sup>475</sup> In 1968, the FPS similarly accepted industry as a part of the Whaling Commission, stating that conservation should be oriented toward building up stocks to ‘once more support a substantial whaling industry.’<sup>476</sup> Such a position was never mentioned again.

The IUCN maintained acceptance of lethal takes for longer than environmental NGOs. In 1967, it advocated for greater consideration of future generations in continued conservation and use of the ‘great ocean resource’ of whales<sup>477</sup> In 1970, the IUCN also sought to remind the Commission of the terms of the Convention as a document attempting to conserve in order to optimise yield.<sup>478</sup> However, both the IUCN and environmental NGOs moved from acceptance of ongoing lethal whaling to a moratorium conservation perspective by 1971.

Over the course of the 1970s, environmental NGOs demonstrated adeptness in balancing the various concerns of the Convention including advocating for ‘compromise’ between different viewpoints and arguing for a moratorium on the basis that it was a compromise that would best achieve a full recovery of whale stocks.<sup>479</sup> The purpose of the recovery (i.e. lethal or non-lethal use) was not discussed. This capacity for balance was exemplified by the Sierra Club and WWF in 1974<sup>480</sup> and 1978<sup>481</sup> with clear

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<sup>474</sup> Nineteenth Meeting of the IWC, *Verbatim Records*, 1967, IWC/19/14, WWF at 73.

<sup>475</sup> Nineteenth Meeting of the IWC, *Verbatim Records*, 1967, IWC/19/14, FPS, ISPA at 73.

<sup>476</sup> Twentieth Meeting of the IWC, *Verbatim Records*, 1968, IWC/20/12, 46 per FPS.

<sup>477</sup> Nineteenth Meeting of the IWC, *Verbatim Records*, 1967, IWC/19/14, IUCN at 72.

<sup>478</sup> Twenty-Second meeting of the IWC, *Verbatim Records*, 1970, IWC/22/10, 59.

<sup>479</sup> Twenty-Fifth Meeting of the IWC, *Verbatim Records*, 1973, IWC/25/13, 24-25.

<sup>480</sup> Twenty-Sixth Meeting of the IWC, *Verbatim Records*, 1974, IWC/26/12-1, 10-11.

<sup>481</sup> Thirtieth Annual Meeting of the IWC, *Verbatim Records* 1978, Resource ID 419, 26.

references to intergenerational benefits of conservation as a tool for re-establishing a whaling industry.

In terms of science and its centrality to the work of the Commission, there was clear consternation among NGOs in 1970 that agreed quotas in the Whaling Commission far exceeded the advice of the Scientific Committee.<sup>482</sup> The moderately sarcastic terms in which this criticism was phrased<sup>483</sup> followed on from a decade or more of significant frustration with the Commission's will to sustainably manage whale stocks in accordance with scientific advice.<sup>484</sup> Science was not frequently mentioned in NGO Opening Statements. However, this may simply have been deference to the privileged position of the Scientific Committee in providing its advice to the Commission. For whatever reasons, there was very little emphasis in environmental NGO Opening Statements on scientific bases to curtail whaling.

The IUCN distinguished itself with clear balance among the object and purpose principles. It recognised the significance of both political and scientific reasons to minimise or stop commercial whaling. While acknowledging the dearth of scientific knowledge of the extent of whale population declines, the IUCN pushed for greater conservation efforts on the basis of the *Stockholm Declaration* in which 120 states expressed grave concerns for whale stocks.<sup>485</sup> It also pushed for greater commitment to scientific research,<sup>486</sup> and a cautious approach to the setting of quotas noting that 'the margins of safety are not adequate to deal with potential errors in the estimate.'<sup>487</sup> This

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<sup>482</sup> Twenty-Second meeting of the IWC, *Verbatim Records*, 1970, IWC/22/10, 62, WWF.

<sup>483</sup> Twenty-Second meeting of the IWC, *Verbatim Records*, 1970, IWC/22/10, 62 – WWF stated that: By voting for a 2700 BWU quota in the Antarctic I think that the Commission appears to have gone on record to indicate that it apparently has reservations about the considered opinion of its own Scientific Committee.'

<sup>484</sup> Gillespie, above n 263, 4-8; Interview with Interviewee 6 (Portorož, Slovenia 15 September 2014).

<sup>485</sup> Twenty-Fourth Meeting of the IWC, *Verbatim Records*, 1972, IWC/24/10, 73.

<sup>486</sup> Twenty-Sixth Meeting of the IWC, *Verbatim Records*, 1974, IWC/26/12-1, 12-13; Twenty-seventh meeting of the IWC, *Verbatim Records*, 1975 IWC/27/12-1, 22.

<sup>487</sup> Twenty-Fourth Meeting of the IWC, *Verbatim Records*, 1972, IWC/24/10, 76.

statement was supported by five environmental NGOs.<sup>488</sup> Other statements, by both environmental NGOs and IUCN referred to diminishing catches over the two centuries of whaling as of sufficient weight to require a pro-conservation policy.<sup>489</sup>

Whatever the reasons for a broader absence of science as a reference point, environmental NGOs began to focus heavily on conservation outside the general mandate of the *Whaling Convention*. For example, whales are referred to as ‘a global property... [with their] own right to exist.’<sup>490</sup> Others urged giving jurisdiction to manage whales to the United Nations.<sup>491</sup> Greenpeace argued from an anti-consumerist view that ‘conservation and non-consumptive values [were] embedded in the foundations of the Commission’ and that consumer ethics were the root cause of the issues besetting the Commission.<sup>492</sup> Friends of the Earth urged that the Commission should begin to consider ‘whales as friends’.<sup>493</sup> These statements fell clearly outside the *Whaling Convention*.

The final Opening Statement that fell far outside the mandate of the Commission was the 1979 attendance of John Denver as a representative of an unnamed NGO.<sup>494</sup> Mr. Denver came ‘not as an expert with facts and figures’ but simply a ‘being who has a very strong feeling of celebration for the life on this planet’.<sup>495</sup> This fell far short of the fundamentally sound arguments valuing long-term conservation for current and future use of whale stocks by human generations. It arguably also indicates an issue with accreditation procedures because simply having an interest in the work of the

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<sup>488</sup> Twenty-Fourth Meeting of the IWC, *Verbatim Records*, 1972, IWC/24/10, 76.

<sup>489</sup> Twenty-Seventh Meeting of the IWC, *Verbatim Records*, 1975, IWC/27/12-1, 13, 15 per WWF; Twenty-Eighth Meeting of the IWC, *Verbatim Records*, 1976, Resource ID 416, 33-34, IUCN.

<sup>490</sup> Twenty-Sixth Meeting of the IWC, *Verbatim Records*, 1974, IWC/26/12-1, 14.

<sup>491</sup> Twenty-Seventh Meeting of the IWC, *Verbatim Records*, 1975, IWC/27/12-1, 19, 27.

<sup>492</sup> Thirtieth Annual Meeting of the IWC, *Verbatim Records*, 1978, Resource ID 419, 39.

<sup>493</sup> Twenty-eighth meeting of the IWC, *Verbatim Records*, 1976, Resource ID 416, 40-43.

<sup>494</sup> Thirty-First Annual Meeting of the IWC, *Verbatim Records*, 1979, Resource ID 421, 13.

<sup>495</sup> Thirty-First Annual Meeting of the IWC, *Verbatim Records*, 1979, Resource ID 421, 14-15.

Commission qualified an NGO to send a representative, and the qualifications of individuals within an NGO were not questioned.

This event encapsulated a shift among environmental NGOs toward emotion-based advocacy for whale conservation and moved NGO Opening Statements outside the confines of the *Whaling Convention*. Animal welfare groups similarly moved from advocacy for humane conduct in the catching and killing of whales<sup>496</sup> to advocacy for no longer catching whales on the basis of what was described by pro-whalers as ‘a philosophical point of view arising from the relative value of the life of human beings and animals.’<sup>497</sup> Without a reference point by which to weigh outcomes and arguments, oral statements of NGOs began to represent their own position rather than reference the work of the Commission and the legal regime by which it was bound.

#### *Written Opening Statements*

The IWC transitioned to written Opening Statements in 1980. The first use of written Opening Statements was in 1980 when Opening Statements moved from being orally presented to being circulated in document form.<sup>498</sup> There were no express terms permitting the submission of Opening Statements by observers prior to 2005,<sup>499</sup> however the practice is now provided for in the *Whaling Commission Rules of Procedure*.<sup>500</sup> The Chair cited matters of time.<sup>501</sup> While this was undoubtedly an aspect of the issue, so too was NGO behaviour. The protests, violent clashes<sup>502</sup> and abuse of

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<sup>496</sup> Eighteenth Meeting of the IWC, *Verbatim Records*, 1966, IWC/18/18, 69.

<sup>497</sup> Thirtieth Annual Meeting of the IWC, *Verbatim Records*, 1978, Resource ID 419, 44.

<sup>498</sup> Thirty-second meeting of the IWC, *Verbatim Records*, 1980, Resource ID 422, 5.

<sup>499</sup> *Whaling Commission Rules of Procedure* (May 1999) in *IWC 51<sup>st</sup> Annual Meeting of 24<sup>th</sup> – 28<sup>th</sup> May 1999*, ‘Fifty-First Annual Report of the International Whaling Commission 1999 – covering the financial year 1998-1999’ (adopted Adelaide, Australia, July 2000) Q. Commission Documents.

<sup>500</sup> *Whaling Commission Rules of Procedure* (September 2015) Q. Commission Documents, 3.

<sup>501</sup> *IWC 32<sup>nd</sup> Meeting of July 1980*, ‘Thirty-Second Report of the International Whaling Commission – covering the 32<sup>nd</sup> financial year 1980-1981’ (Brighton, United Kingdom, adopted June 1981) Chair’s statement.

<sup>502</sup> Thirty-First Annual Meeting of the IWC, *Verbatim Records*, 1979, Resource ID 421, 24.

Commission time<sup>503</sup> were likely unspoken reasons, potentially avoidable by Commission rules containing expectations that observers demonstrate a balanced engagement with object and purpose principles. However, there were no forthcoming rebukes from the Commission to observer NGOs on any matter of conduct. The Chair did not say anything about the appropriateness of having John Denver as an NGO representative or about his performance.<sup>504</sup>

This transition to documentary Opening Statements continues to be the form employed for Opening Statements in the Whaling Commission today. From 1980 – 2016, the content of such Opening Statements has ranged across many agenda items. The Opening Statements bearing on the designation, review and continuation of the Southern Ocean Whale Sanctuary are explored in Chapter 7.

Many NGOs have attended frequently and submitted Opening Statements between 1980 and 2016, including World Wildlife Fund (WWF), World Society for the Protection of Animals (WSPA now WAP), Cetacean Society International (CSI) and the Animal Welfare Institute (AWI). Environmental NGOs dominate the written Opening Statement records, with the consistent but not annual attendance of the IUCN as a hybrid and notable NGO presence. Several cultural and industry NGOs have also been in regular attendance. A broad characterization of anti-whaling environmental NGO Opening Statements is conservation-oriented, advocating for a shift in the regulatory interests of the Commission to non-lethal, non-consumptive use of whale stocks. Pro-whaling environmental or hybrid NGOs, mostly visible as Global Guardian Trust (GGT) and the

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<sup>503</sup> Thirty-First Annual Meeting of the IWC, *Verbatim Records*, 1979, Resource ID 421, 13-15.

<sup>504</sup> Thirty-First Annual Meeting of the IWC, *Verbatim Records*, 1979, Resource ID 421, 17.



IWMC World Conservation Trust (IWMC) focus on sustainable use,<sup>505</sup> or emphasize the conservation–use intersection of the *Whaling Convention* object and purpose.<sup>506</sup>

The documentary submissions of all Whaling Commission NGOs are largely characterized by political advocacy, often arguing for compliance with principles of international environmental law. The IUCN consistently propounded best practice approaches to whale regulation, in line with international law and environmental practice.<sup>507</sup> The Whale and Dolphin Conservation Society (WDCCS) and Tusk Force argued for the adoption of the precautionary approach in whaling regulation.<sup>508</sup> The adoption of the precautionary approach within the Commission would satisfy the obligations of the Commission to international legal principles. However, other Opening Statements were more akin to a chorus of voices saying either ‘yes’ or ‘no’ to whaling without any concrete reason for the choice. There were exceptions in which scientific argument and information was put forward,<sup>509</sup> but these were not the rule.

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<sup>505</sup> Global Guardian Trust, *Opening Statement of Global Guardian Trust IWC/47/OS GGT* (1995); Global Guardian Trust, *Opening Statement of Global Guardian Trust to the 48<sup>th</sup> Annual Meeting of the IWC IWC/48/OS GGT* (1996); IWMC, *Opening Statement by the International Wildlife Management Consortium to the 46<sup>th</sup> Meeting of the IWC IWC/46/OS IWMC* (1994); IWMC WCT, *Opening Statement to the 54<sup>th</sup> Annual Meeting of the IWC IWC/54/OS IWMC* (2002).

<sup>506</sup> Global Guardian Trust, *Opening Statement IWC/52/OS/GGT* (2000); GGT, *Global Guardian Trust Opening Statement to the 61<sup>st</sup> Annual Meeting of the IWC IWC/61/OS GGT* (2009); IWMC, *Opening Statement by Eugene LaPointe, President International Wildlife Management Consortium IWC/47/OS IWMC* (1995).

<sup>507</sup> IUCN, *Statement to the 35<sup>th</sup> Annual Meeting of the IWC IWC/35/OS/IUCN* (1983); IUCN, *IUCN Statement to the International Whaling Commission IWC/39/OS IUCN* (1987); IUCN, *Statement to International Whaling Commission IWC/42/OS/IUCN* (1990); IUCN, *Statement to the 45<sup>th</sup> IWC meeting IWC/45/OS IUCN* (1993); IUCN, *Statement to the 50<sup>th</sup> Meeting of the IWC IWC/50/OS/IUCN* (1998); IUCN, *Opening Statement IWC/55/OS IUCN* (2003); IUCN, *Statement IWC/66/OS IUCN* (2016).

<sup>508</sup> Whale and Dolphin Conservation Society (WDCCS) and Tusk Force, *Joint Statement IWC/49/OS WDCCS* (1997).

<sup>509</sup> Rick Spills and Jennifer Coates, *Science Does Not Support Acceptance of the Revised Management Procedure IWC/46/OS AWI* (1994); Rick Spill, *RMP Update: 1994 Scientific Committee Papers Indicate Further Flaws Which Need to be Remedied IWC/46/OS AWI-ANNEX 1* (1994). Interestingly, these Opening Statements contained arguments against the RMP, relying on articles and arguments developed by a key proponent of the RMP; ORCA, *Statement IWC66, Portorož, Slovenia IWC/66/OS ORCA*.

Generally, the tenor of environmental NGO Opening Statements focuses on conservation. However, this is not necessarily a focus on conservation without use. Conservation was often characterized as conservation as the *antidote* to overuse.<sup>510</sup> To this extent the anti-whaling NGOs' conservation considerations were initially concerned with conservation as a counterpoint to the very real excesses of the whaling industry and the Commission's history of poor regulation and overexploitation.<sup>511</sup> Conservation was fundamentally about proper regulation so that the whaling industry could recover. The position is a political counterpoint to a reality of excessive use. It may be inferred that before evidence of stock rehabilitation sufficient to sustain whaling emerged, environmental NGOs considered the full range of object and purpose principles because the apparent overemphasis on conservation was in response to the actual overuse of whale resources. Written Opening Statements are explored more fully in Chapters Six and Seven.

#### *Use of speaking rights by NGOs to address the Commission agenda*

The 2014 amendments to the *Whaling Commission Rules of Procedure* and *Rules of Debate* have given NGOs the privilege of speaking to the agenda on each agenda item, pending approval of the Chair and any time constraints.<sup>512</sup> These amendments extend to plenary sessions and sessions of Commission subsidiary groups and Committees. Part A of the *Rules of Debate* state that '...Observers, which should be allowed to speak only after all Commissioners desiring to speak do so. As a general rule, Observers will only be allowed to speak once at each Agenda item under discussion, and at the discretion of the

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<sup>510</sup> *Statement to the 35<sup>th</sup> Annual Meeting of the IWC* IWC/35/OS/IUCN (1983); IUCN, *Statement to IWC* IWC/41/OS IUCN (1989); IUCN, *Statement to International Whaling Commission* IWC/42/OS/IUCN (1990); American Association of Zoological Parks and Aquariums; international Association for Aquatic Animal Medicine, International Marine Animal Trainers Association; Marine Mammal Interest Group, *Opening Statement*, IWC43/OS AAZPA, IAAAM, IMATA, MMIG (1991); WWF, *Opening Statement to the 43<sup>rd</sup> Annual Meeting of the IWC* IWC/43/OS WWF (1991); ELSA, *Opening Statement to the 45<sup>th</sup> Annual Meeting of the IWC* IWC/45/OS ELSA (1993); ACS, *American Cetacean Society Opening Statement* IWC/54/OS ACS (2002); IFAW, *Opening Statement* IWC/54/OS IFAW (2002); WWF, *Opening Statement* IWC/64/OS WWF (2012).

<sup>511</sup> Gillespie, above n 263.

<sup>512</sup> *Whaling Commission Rules of Debate*, Part A. Right to Speak, section 1.

Chair.’<sup>513</sup> This creates natural limitations on observers and requires them to decide among themselves which representative will speak, and which points shall be brought to the Commission’s attention.

Observers, while restricted from criticizing members in written statements do not have the same restriction when speaking to the agenda. In terms of active formal engagement, there is a stipulation in the *Whaling Commission Rules of Procedure* that Opening Statements of all parties be directed toward the Commission generally and not toward any particular Commission member.<sup>514</sup> While this rule quells some level of agitation for approved observers, it does not prevent it, as many environmental NGOs resort to simply writing ‘**some** IWC members [emphasis added]’ when directing criticism toward a member state, and relying on context to make their meaning plain.<sup>515</sup>

There has been some use of observer speaking rights in Commission meetings and subcommittee meetings in a manner that would breach the *Code of Conduct* requirement to not direct comments toward particular members. In 2014, an NGO delegate used speaking rights in the plenary to agitate on New Zealand domestic matters, directing criticism to New Zealand on its policies to protect small cetaceans

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<sup>513</sup> *Whaling Commission Rules of Debate*, Part A. Right to Speak, section 1.

<sup>514</sup> *Whaling Commission Rules of Procedure*, Rule Q.3 Opening Statements ... shall be in the form of views and comments made to the Commission in general rather than directed to any individual or group of Contracting Governments.’

<sup>515</sup> WWF, *WWF Statement to the 36<sup>th</sup> Annual Meeting of the IWC, 18-22 June 1984, Buenos Aires, Argentina* IWC/36/84/OS/WWF (1984); WWF, *WWF Statement to the 37<sup>th</sup> Annual Meeting of the IWC* IWC/37/OS WWF (1985); Whale Center, *Whale Center Statement to the 37<sup>th</sup> Annual Meeting of the IWC* IWC/37/OS WC (1985); IUCN, *IUCN Statement to the IWC* IWC/38/OS IUCN (1986); IUCN, *Statement to IWC* IWC/41/OS IUCN (1989); IFAW, *‘Actions for Protection of Whales in Puerto Vallarta and Beyond’: Opening Statement by the International Fund for Animal Welfare (IFAW)* IWC/46/OS IFAW (1994); ITF, *International Transport Workers’ Federation Statement to the IWC – 1994* IWC/46/OS ITWF (1994); JFA, *Opening Statement by the Japan Fisheries Association* IWC/46/OS JFA (1994); AWI, *Animal Welfare Institute Opening Statement to the 62<sup>nd</sup> Annual Meeting of the IWC* IWC/62/OS AWI (2010); GGT, *Opening Statement to the 62<sup>nd</sup> Annual Meeting of the IWC* IWC/62/OS GGT (2010); Species Management Specialists, *Opening Statement* IWC/62/OS SMS (2010); Humane Society International, *Opening Statement* IWC/64/OS HSI (2012); Instituto de Conservación de Ballenas, *Opening Statement* IWC/66/OS ICB (2016).

within their EEZ.<sup>516</sup> In 2016, in the Whale Killing Methods subcommittee meeting, an NGO delegate directly questioned Japan's *Schedule* objection to the ban of the cold grenade harpoon.<sup>517</sup> Neither delegate was disciplined by the Chair.

The *Code of Conduct* requires NGOs to refrain from making defamatory statements in 'for-information' documents distributed outside the meeting room, to refrain from disruptive conduct,<sup>518</sup> and to 'behave with due and proper respect for the meeting proceedings and to all Contracting Governments and other governments attending IWC meetings'.<sup>519</sup> Yet, in 2016, an NGO representative<sup>520</sup> indicated they wished to speak to the agenda item 'Cooperation with other organizations'; instead they began to make a statement on canned whale meat for sale on the internet. The representative was allowed to digress from the agenda item for several minutes before being brought to order by the Chair after she failed to address his requests to speak to the agenda item.<sup>521</sup> With the exception of one Opening Statement directly critical of Japan being withdrawn from the meeting records in 1998,<sup>522</sup> there has been no consensus censure of NGO meeting conduct, despite there being clear breaches. Nor has there been

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<sup>516</sup> Dr Barbara Maas (NABU), *Intervention on the Hector's and Maui dolphins* (IWC65; 17 September 2014) [19.1] directly addressing New Zealand on alleged failure to address conservation issues within their domestic waters and *not* an agenda item (IWC/65/01 Rev 1). The Chair did not address this breach of conduct.

<sup>517</sup> Humane Society International, *Intervention on the Cold Grenade Harpoon* (IWC66, Conservation Committee; 20 October 2016) directly addressed and criticised Japan despite the item not being on the agenda (IWC/66/WKM&WI01). As with NABU, HSI was not censured for their breach of the *Rules of Debate*.

<sup>518</sup> Letter from Dr Nick Grandy, Secretary to the IWC to Mr Jeremy Wales, United Nations Economic Commission for Europe, 13 October 2006, Annex 4; IWC Secretariat, *Draft Code of Conduct for NGOs at IWC meetings and complaints procedures* (2018) IWC/67/FA/24.

<sup>519</sup> *Ibid.*

<sup>520</sup> Whale and Dolphin Conservation.

<sup>521</sup> Whale and Dolphin Conservation, *Intervention of Whale and Dolphin Conservation on agenda item 18; Co-operation with other organizations*, observed by candidate at the IWC66 meeting (Portorož, Slovenia, 27 October 2016).

<sup>522</sup> Int Wild Coal, *Declaration of Concern for Small Island Nations Being Subjected to Japanese Influence at International Conservation Treaty Deliberations* IWC/50/OS Int Wild Coal (1998).

reconsideration of lacuna evident in the current rules. These issues are discussed in Chapter Eight.

## 5.4 Discussion and Conclusion

### 5.4.1 Discussion

The attendance records of the two Commissions demonstrate some key differences in how the accreditation process has shaped the relationship between Commissions and NGO observers. This is particularly clear from an object and purpose analysis standpoint. The CAMLR Commission requires NGO applicants to demonstrate a capacity to contribute to the object and purpose principles animating the work of the Commission; there has been substantial adherence to these terms in oral and written submissions. The repetition of the expectations of the Commission, made clear in both meeting reports and in correspondence between NGOs and the Commission has reinforced this position.

The position of the Whaling Commission toward NGO observers, with no documented attempts to direct the observer roles toward object and purpose principles animating the work of the Commission has resulted in minimal attention paid to the legal framework binding the Commission. While it was noted that this is part of a larger issue with the attempted reconstruction of the *Whaling Convention* by states, NGOs and academics, there are no clear requirements set out by the Whaling Commission for NGOs to refer to or abide by the object and purpose principles of the *Whaling Convention*.

This is not to say that the object and purpose analysis necessarily demonstrates causal connections between adherence to the object and purpose and the value of contributions. It is equally possible to observe other correlations between characteristics of the Commissions and their observers, and the value or compliance of their conduct. For example, larger numbers of observers encourage a very different relationship than where small numbers of observers are welcomed. The sheer scale of NGO observers at the Whaling Commission has, until the 2014 amendment to the *Whaling Commission Rules of Procedure* and *Rules of Debate*, been inversely proportionate to the engagement roles available to them. In contrast, the small and

consistent number of NGO observers in the CAMLR Commission parallels the steady and consistent rights of access to the Commission given to those observers.

Subsequent Commission responses to NGO behaviour indicate that there are two very different relationships in the Whaling and CAMLR Commissions regarding observer NGOs. It was noted in 5.3.1 that the CAMLR Commission, its Chair and individual states had often thanked ASOC and other NGOs for their contributions to the work of the Commission. In the Whaling Commission the absence of such communication in Meeting Reports speaks to the lack of material contribution made by NGOs to the work of the Commission. This can be attributed to the undisciplined approach to NGO observer attendance and meeting rules.

#### 5.4.2 Conclusion

The attendance and conduct expectations of Commissions may act as causal factors in encouraging NGO observer applicants to adhere to and support the work of the Commission in accordance with object and purpose principles. Chapter Eight relies on these observations of meeting rules and admittance requirements to discuss possible recommendations that might facilitate NGO contributions that are of value to Commission work. Chapter Eight also relies on these observations to ask whether object and purpose principles may unduly restrict aspects of NGO engagement.

In the Whaling Commission, amendment of the *Rules of Procedure* and *Rules of Debate* to be consistent with non-criticism expectations on observers submitting Opening Statements is a possible means of preventing observers from contributing to or inciting fractious meeting proceedings. Similarly, there may be benefits to drafting clear powers of the Chair to stop and have struck from the record oral addresses from observers where the observer has failed to exercise the speaking right in accordance with the *Rules of Debate*. The *Code of Conduct* could also bear some alteration to require standards of behaviour among NGO observers to minimise the discord clear between pro- and anti-whaling factions. All these must be prefaced by clearer and stricter terms of admission for observers to require 'contribution' rather than 'interest.

In the CAMLR Commission, there has been a bulging increase in observer delegation attendance. While states may have advisors and other delegation members to assist the Commissioner, the capacity of observers to send delegations larger than those of most

states may need curtailment. The oversaturation of meeting space, particularly with ASOC delegates, may be met with a responsive dilution of the perceived credibility and value of their contributions to the work of the Commission. This is particularly so where combative positions are taken by delegates in informal spaces.

The following two chapters engage with two dominant issues that have surfaced in both Commissions – the enforcement of law in relation to perceived breaches of the terms of the conventions, and the designation of protected areas. These two chapters present an in-depth object and purpose analysis of two issues so that the general observations of this chapter on whether NGOs do adhere to object and purpose principles can be tested.

## Chapter 6: NGO engagement over catch regulation and enforcement

### 6.1 Introduction

Chapter Five evaluated NGO engagement across the history of the Commissions and the admissions processes in the CAMLR Commission and Whaling Commission through an object and purpose framework. This chapter provides an in-depth analysis of the issue of catch regulation measures and enforcement of regulatory measures. It analyzes the extent to which NGO observers and non-observer NGOs abide by or refer to the object and purpose in the CAMLR Commission and the Whaling Commission when engaging with catch regulation measures and enforcement of regulatory measures. The focus in the CAMLR Commission is the regulatory and enforcement measures addressing illegal, unreported and unregulated (IUU) fishing of Patagonian toothfish (*dissostichus eleginoides*) In the Whaling Commission, the focus is on the regulation of scientific whaling practices of Japan in the Southern Ocean.

The importance of catch regulation cannot be understated. IUU fishing threatens global fisheries, threatens the capacity of international bodies to sustainably manage fisheries, and threatens the health of global marine ecosystems.<sup>523</sup> Its operations are increasingly being compared to organized crime.<sup>524</sup> Because of the Antarctic and Southern Ocean's

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<sup>523</sup> FAO, *Illegal, unreported and unregulated fishing* (FAO, 2016); *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement)* opened for signature 22 November 2009, UNTS 54133 (entered into force 5 June 2016).

<sup>524</sup> Lynden Griggs and Gail Lugten, 'Veil Over the Nets: Unravelling Corporate Liability for IUU Fishing Offences' (2007) 31 *Marine Policy* 159; Ioannis Chapsos and Steve Hamilton, 'Illegal fishing and fisheries crime as a transnational organized crime in Indonesia' (2018) *Trends in Organized Crime* <https://doi.org/10.1007/s12117-018-9329-8>; Henrik Österblom, Andrew Constable, Sayaka Fukumi, 'Illegal fishing and the organized crime analogy' (2011) 26(2) *Trends in Ecology & Evolution* 261; Le Gallic, Bertrand and Anthony Cox, 'An economic analysis of illegal, unreported and unregulated (IUU) fishing: Key drivers and possible solutions (2006) 30(6) *Marine Policy* 689, 690; Eksil Engdal and Kjetil Sæter (Diane Oatley (transl.)), *Catching Thunder* (Scribe Publications, 2018).



unique status as ‘last great wilderness’,<sup>525</sup> responses to IUU fishing in the CAMLR Commission are particularly significant. How NGOs contribute to this important issue is worthy of scrutiny.

Catch regulation in the CAMLR Commission includes legal catch allocation, seasonal open and closed areas, and fishing gear regulation in conservation measures.<sup>526</sup> It also includes the development of measures to prevent IUU fishing of CCAMLR-Area fish stocks, particularly Patagonian toothfish (*Dissotischus eleginoides*). Catch enforcement involves the prevention of fishing by IUU fishing vessels, and pursuit of legal action against vessel owners.

IUU fishing in the CAMLR Commission became a focal issue in the 1990s. Numerous conservation measures are directed toward understanding and preventing IUU fishing, including port and flag states measures such as the Catch Documentation Scheme (CDS), the creation of the IUU vessel register, and the implementation of a Vessel Monitoring System (VMS). As this chapter will discuss, observer NGOs address all these issues as part of their participation in the Commission. The intersessional enforcement capacities of states and non-states to prevent fishing activities of IUU vessels is an increasingly important tool in the fight against IUU fishing. This aspect is focused on through the work of the Coalition of Legal Toothfish Operators (COLTO) and Sea Shepherd.

This chapter examines scientific whaling in the Whaling Commission from the issue’s first appearance in 1977 through to the 2014 International Court of Justice (ICJ) decision and associated Commission discussions.<sup>527</sup> It evaluates the use of Opening Statements, protest at meetings, and the intersessional activities of the non-observer NGO, Sea Shepherd against Japanese whaling research vessels in the Southern Ocean.

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<sup>525</sup> Stanley Johnson, *Antarctica; The Last Great Wilderness* (Weidenfeld & Nicolson, 1985).

<sup>526</sup> CCAMLR Conservation Measures Category 10 – compliance, Category 22 – Gear regulations, Category 32 – Fishing seasons, closed areas and prohibition of fishing, Category 33 – By-catch limits, Category 41 – Toothfish. See: CCAMLR, *Browse Conservation Measures* (20 October 2014) <https://www.ccamlr.org/en/conservation-and-management/browse-conservation-measures>.

<sup>527</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226.

Whaling, and scientific whaling is also an important issue. Scientific whaling has been one of the most contentious environmental issues of the last twenty years. Scientific whaling raises several matters of significance to international law and the global environment. The questions of whether some cetaceans can be commercially harvested in the Southern Ocean, and whether they should be, are raised. Beyond these, the Japanese research programs engaged complex issues of the jurisdiction of the Whaling Commission and interpretation of the *Whaling Convention*. These included the obligation of good faith in the issue of special permits, the extent of oversight to which the Commission and its Scientific Committee could subject the special permits, and the rights of non-states to carry out preventative enforcement measures against states to uphold a non-state interpretation of international law.

Scientific whaling also raised other issues of international law. It brought into question territorial claims under the *Antarctic Treaty*.<sup>528</sup> There were also assertions of Australian law being breached by the Japanese fleet in whaling in the Southern Ocean Sanctuary,<sup>529</sup> and claims of authority in Sea Shepherd pursuing their course of action against the JARPA-II vessels.<sup>530</sup> Issues of maritime safety were also raised. The International Maritime Organization (IMO) turned its attention to Sea Shepherd's engagement with the Japanese whaling fleet, resulting in IMO and Whaling Commission resolutions on Safety at Sea. While aspects of the actions of Sea Shepherd have been evaluated from a variety of perspectives,<sup>531</sup> an object and purpose analysis is a new viewpoint that depoliticizes the issue of whaling in general.

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<sup>528</sup> *Antarctic Treaty*, Article IV.

<sup>529</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425.

<sup>530</sup> Cameron SG Jefferies, 'Strange Bedfellows or Reluctant Allies?: Assessing Whether Environmental Non-Governmental Organizations (ENGOS) Should Serve as Official Monitors of Whaling for the International Whaling Commission (2009) 26 *Windsor Review of Legal and Social Issues* 75, 87-94.

<sup>531</sup> Blay and Bubna-Litic, above n 384, 466; Brisman, above n 384, 755; Guevara, above n 35, 60; Christopher J Covill, 'Greenpeace, Earth First! and The Earth Liberation Front: The Progression of the Radical Environmental Movement in America (2008) 5 *Senior Honors Projects*. Paper 93, 16, 23, 101-113; Jabour and Iliff, above n 384, 276-285; Anton, above n 383, 138, 145; Gerry Nagtzaam, 'Gaia's Navy: The Sea Shepherd Conservation Society's Battle to Stay Afloat and International Law' (2014) 38 *William &*

The object and purpose analyzes in this chapter address the observer roles, such as documentary and oral submissions, and whether NGO behaviours fit the expectations of non-state engagement provisions. This is also applied to the non-observer NGO, Sea Shepherd in relation to both the CAMLR and Whaling Commissions and Sea Shepherd activities in relation to IUU fishing and scientific whaling.

In the CAMLR Commission, the NGO roles of documentary and oral submissions are considered in relation to hybrid, industry and environmental NGO observers, IUCN, COLTO and ASOC. The chapter also evaluates the practical actions of the industry NGO, COLTO, to enforce and support compliance with conservation measures, and increase Commission access to data on IUU activity.

in the Whaling Commission, Opening Statements of NGOs from 1977 until 2014 are considered. There was some limited input from trade unions that cannot be classified as industry NGOs, and so are considered in contrast to the environmental NGOs to provide a counterpoint in the discussion. The use of designated meeting protest spaces in 2014 and 2016 is also discussed in counterpoint to authorized observer NGO engagement.

How NGOs contribute to protecting the Southern Ocean, and how NGO behaviours impact on international cooperation are significant matters in addressing transnational crime and state power. IUU fishing and scientific whaling have been divisive issues, and to examine the way in which NGOs have affected interactions on them can lead to opportunities for greater and more effective cooperation and participation by NGOs within the rule of law. It may be possible that NGOs take on a more significant role in assisting IGOs in enforcing and upholding international law.<sup>532</sup>

The object and purpose analysis applied to behaviours outside of the sanctioned position of observer provides insight into why non-observer NGOs may not have sought or been granted observer status. But it also determines the extent to which their work adheres to the rule of law and is of use to each Commission. The rule of law and utility is

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*Mary Environmental Law and Policy Review* 613; Nagtzaam and Lentini, above n 384; Fallon, above n 35; Tara Helfman, 'The Dread Pirate *Who?* Challenges in Interpreting Treaties and Customary International Law in the United States' (2016) 90 *Tulane Law Review* 805; Whitney Magnuson, 'Marine Conservation Campaigners as Pirates: The Consequences of *Sea Shepherd*' (2014) 14 *Environmental Law* 923.

<sup>532</sup> Jefferies, above n 530.

defined by consideration of object and purpose principles. Not all non-observer NGO behaviour falls short of considering to the object and purpose. Demonstrating which behaviours align with the object and purpose principles can assist in understanding how NGOs may best direct their work to support the Commissions in their work and set an acceptable standard of participation and accountability.

The analysis in this chapter proceeds in five parts. Part 6.2 outlines the catch regulation powers under the *CAMLR Convention* and *Whaling Convention* and explains the history of IUU and scientific whaling as regulatory problems. Part 6.3 examines the NGO roles on these issues in both Commissions. Parts 6.4 and 6.5 evaluate those roles in light of the object and purpose of the CCAMLR and IWC, respectively. Part 6.6 reflects on the implications of the chapter's findings. It concludes that NGO contributions that adhere to convention object and purpose are most likely to have the highest impact on the work of a Commission, even when they do not align with the actions of member states. NGO behaviours that only state their political position and provide no tangible contribution to the work of the Commission in light of its object and purpose principles are the least likely to be noticed or reflected in Commission meeting records, and therefore have the weakest impact.

The analysis of both sanctioned and outlier NGO behaviours demonstrates that it is not the *position* of the NGO but the adherence of its actions to the object and purpose that is indicative of the value of those actions to the Commission. This is despite the antagonism or hostility of any member state. The implication of this is that the rule of law is the best measure for effective engagement, and the standard to which both states and non-states must direct their attention.

## 6.2 Catch regulation powers

### 6.2.1 CAMLR Commission

The *CAMLR Convention* was drafted in the late 1970s, largely in response to concerns among *Antarctic Treaty* consultative parties about emergent and unregulated commercial interest in the marine living resources of the Southern Ocean.<sup>533</sup> IUU fishing

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<sup>533</sup> Norway, *Marine biological resources in Antarctic. Questions concerning necessary measures (Paper submitted by Norway)* ANT/6 (26 May 1975) 1-2; Working Group, *Antarctic Marine Living Resources (Draft Recommendation submitted by Working Group)*

first appeared as a central concern on the CAMLR Commission agenda in 1997. In 1990, the Commission began to discuss the need to acquire fisheries data from non-member states. This was a response to concerns over the accuracy of information about the volume of marine living resources being extracted from the Southern Ocean. There was a need to understand the extent to which data might indicate unregulated catch taken in the Southern Ocean was being landed in non-member state ports and being taken by non-member vessels. There was discussion about whether non-member states should be informed of and requested to comply with the convention's objectives.<sup>534</sup>

The first formal mention of IUU fishing on the Commission agenda occurred in 1994<sup>535</sup> and again in 1995,<sup>536</sup> with an intervention by the IUCN observer.<sup>537</sup> In 1996, Norway urged 'that illegal and unreported fishing is currently the greatest threat to CCAMLR'<sup>538</sup> and the delegation of South Africa submitted a Working Paper entitled 'Report on Illegal Fishing'.<sup>539</sup> IUU fishing was placed on the agenda in 1997, and has remained an agenda item since then.<sup>540</sup>

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ANT/16/Rev.1 (18 June 1975); SCAR, SCOR, SCOR Working Group 54, *Biological Investigations of Marine Antarctic Systems and Stocks (BIOMASS): Summary of objectives and programmes* ANT/IX/10 Provisional Agenda Item 6 (14 September 1977) Preface; United Kingdom, *Antarctic Marine Living Resources (Paper submitted by the United Kingdom)* ANT/IX/6 (14 September 1977) 2.

<sup>534</sup> *CCAMLR-IX Meeting of 22 October – 2 November 1990*, 'Report of the Ninth Meeting of the Commission' (Hobart, Australia, adopted 2 November 1990) [10.3].

<sup>535</sup> *CCAMLR-XIII Meeting of 26 October – 4 November 1994*, 'Report of the Thirteenth Meeting of the Commission' (Hobart, Australia, adopted 4 November 1994) [1.29], [1.30], [3.2], [5.11], [5.12], [5.21], [7.2.ix].

<sup>536</sup> *CCAMLR-XIV Meeting of 24 October – 3 November 1995*, 'Report of the Fourteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November 1995) [1.18], [1.22], [1.23], [1.37], [2.23-2.25], [2.7] [5.24], [7.3], [7.6-7.9], 7.15].

<sup>537</sup> *Ibid* [11.9].

<sup>538</sup> *CCAMLR-XV Meeting of 21 October – 1 November 1996*, 'Report of the Fifteenth Meeting of the Commission' (Hobart, Australia, adopted 1 November 1996) [12.13].

<sup>539</sup> Delegation of South Africa, *Report on Illegal Fishing* CCAMLR-XV/18 (1996).

<sup>540</sup> *CCAMLR-XVI Meeting of 27 October – 7 November 1997*, 'Report of the Sixteenth Meeting of the Commission' (Hobart, Australia, adopted 7 November 1997) Annex 3, item 5.

The definition of IUU fishing is not contained in the *CAMLR Convention*. In terms of practice, third party vessels fishing in the area and flagged to non-member states or flags of convenience are branded unregulated fishers. There is also a compliance mechanism within the Commission to address vessels flagged to member states that have caught over their allocated catch.<sup>541</sup> These can be, for the duration of their unlawful fishing, termed illegal fishing vessels. However, this categorisation cannot be addressed here as it is a political issue in the Commission that extends beyond the scope of this thesis.<sup>542</sup>

The capacity to determine all aspects of marine living resources conservation and rational use, such as setting total allowable catches (TACs) and developing responses to IUU fishing is contained in Article IX of the *CAMLR Convention*. Under Article IX, the CAMLR Commission is to give effect to the principles and objectives of Article II. It will be recalled that Art II provides that conservation is the primary objective of the Commission; that rational use is to be considered part of conservation; that an ecosystem approach is to be taken and, consistent with developments in international law, so is the precautionary approach. Conservation and rational use are predicated on the longevity of marine living resource stocks. Article IX also makes clear that scientific

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<sup>541</sup> The Standing Committee on Implementation and Compliance (SCIC) addresses IUU fishing on the part of member state vessels, and NGOs have submitted on the issue: ASOC, *The Hongjin 707: Case study and recommended next steps for CCAMLR* CCAMLR-XXXV/BG/08 (2016). However, the issue of 'IUU' fishing on the part of member states is located in a broader issue of recognition of straddling stocks and the application of the *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001) to the jurisdiction of the CAMLR Commission.

<sup>542</sup> For example: *CCAMLR-XXII Meeting of 27 October – 7 November 2003*, 'Report of the Twenty-Second Meeting of the Commission' (Hobart, Australia, adopted 7 November 2003) [11.2]. Reference is made to 'metapopulation' assessment rather than 'straddling stock'; R Williams, AJ Constable, C Davies and S Candy (Australia), *A possible model of metapopulation structure of Dissostichus eleginoides in the southern Indian Ocean* WG-FSA-03/72; Fishery Report 2014: *Dissostichus eleginoides* Kerguelen Islands French EEZ (Division 58.5.1); Fishery Report: *Dissostichus eleginoides* Heard Island (Division 58.5.2).

research and study and the advice of the Scientific Committee are the basis of all decisions of the Commission.<sup>543</sup>

IUU fishing hampers the capacity of the Commission to effectively manage the conservation of marine living resources and ecosystems. This affects the drafting of Conservation Measures, as the extent of IUU harvest is difficult to measure, and cannot be fully accounted for in determining Conservation Measures that focus on harvest of resources and sustainable use.<sup>544</sup> Another issue is that the impact of IUU fishing methods cannot always be satisfactorily measured in terms of harm to other species, such as seabirds, within the Southern Ocean ecosystem, or the physical landscape.<sup>545</sup> IUU fishing therefore undermines the capacity for the Scientific Committee to give ‘the best scientific advice possible’ for conservation measures because of this uncertainty.<sup>546</sup> In so doing, it undermines the fundamental object and purpose of the *CAMLR Convention*.

The CAMLR Commission’s response to IUU fishing includes: development and implementation of the Catch Documentation Scheme (CDS); the Vessel Monitoring System (VMS); and the IUU vessel register. These responses involved developing complex interorganizational and international responses to IUU vessels, catch and landing, with cooperation from non-signatory port states, the International Maritime Organization (IMO), Interpol, and companies legally fishing in the Convention Area.

The Commission’s IUU fishing regulatory powers are exercised with reference to conservation including rational use, with a view to long-term, sustainable fisheries. One aspect of this is the capacity of the Commission and its Scientific Committee to sufficiently determine the impact of legal fishing on fish populations, as well as account for IUU fishing impacts in determining TACs for legal operators. This presents an intersection of conservation and rational use with an emphasis on the precautionary approach, as the uncertainty of stock assessment with IUU impacts necessitates conservation-oriented decision-making with uncertain data.

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<sup>543</sup> *CAMLR Convention*, Article IX.1.a – f; IX.4.

<sup>544</sup> FAO, *Illegal, unreported and unregulated fishing* (FAO, 2016).

<sup>545</sup> *Ibid.*

<sup>546</sup> *CAMLR Convention*, Article IX.1.f.

### 6.2.2 Whaling Commission

Scientific whaling is the harvesting of whales for the purposes of scientific research under Article VIII of the *Whaling Convention*. The scientific whaling mandate requires that any whales taken be processed for consumption or sale.<sup>547</sup> The scientific whaling programs of Japan, under the Japanese Antarctic Research Programs (JARPA), have been represented by environmental NGOs as a means of engaging in commercial whaling, in defiance of the zero commercial whale catch limit (commonly called the commercial whaling moratorium) through a so-called “loophole” in the *Whaling Convention*.<sup>548</sup> This perspective was not confirmed by the International Court of Justice (ICJ) in its *Whaling Case* judgment in 2014. The Court declined to make a finding on this. It satisfied itself with finding that the nature of the JARPA whaling programs failed to satisfy the ‘whaling for scientific purposes’ requirement of Article VIII.<sup>549</sup>

Scientific whaling permits became a long-standing matter of concern in the Whaling Commission immediately after the 1986 finalization of the commercial whaling moratorium. This was not restricted to the Japanese delegation; Iceland and Norway also issued permits.<sup>550</sup> The Japanese voyages to the Southern Ocean to engage in JARPA

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<sup>547</sup> *Whaling Convention*, Article VIII.2.

<sup>548</sup> WWF, *WWF Statement to the 40<sup>th</sup> Annual Meeting of the IWC* IWC/40/OS WWF (1988); ELSA Nature Conservancy, *Open Statement to the 41<sup>st</sup> Annual Meeting of International Whaling Commission* IWC/41/OS ELSA (1989); IFAW, *Opening Statement 55<sup>th</sup> Meeting of the IWC* IWC/55/OS IFAW (2003); Animal Welfare Institute, *AWI Opening Statement* IWC/57/OS AWI (2005); Cousteau Society, *Opening Statement to the 57<sup>th</sup> meeting of the IWC* IWC/57/OS CS (2005); WWF, *Opening Statement: 58<sup>th</sup> meeting of the IWC* IWC/58/OS WWF (2006); AWI, *Opening Statement of the Animal Welfare Institute* IWC/59/OS AWI (2007); Greenpeace, *Greenpeace Opening Statement* IWC/59/OS GP (2007); IFAW, *Opening Statement to the 59<sup>th</sup> annual meeting of the IWC* IWC/59/OS IFAW (2007); Natural Resources Defense Council, *Opening Statement* IWC/59/OS (2007); WWF, *WWF Opening Statement to the 59<sup>th</sup> meeting of the IWC* IWC/59/OS WWF (2007); WWF, *WWF Opening Statement* IWC/60/OS WWF (2008); ACS, *American Cetacean Society Opening Statement* IWC/61/OS ACS (2009); AWI, *Animal Welfare Institute Opening Statement to the 61<sup>st</sup> annual meeting of the IWC* IWC/61/OS AWI (2009).

<sup>549</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226, [230].

<sup>550</sup> *IWC 39<sup>th</sup> Annual Meeting of June 1987, ‘Thirty-Ninth Report of the International Whaling Commission – covering the financial year, 1987-1988’* (Bournemouth, UK, adopted June 1988) 1, 11-13.



I and II drew the most commentary from both the Commission and NGOs. The JARPA II program attracted the attention of Sea Shepherd and Greenpeace in 2005. Both NGOs attempted to enforce the Australian designation of a whale sanctuary in its claimed Exclusive Economic Zone (EEZ) off the coast of Australian Antarctic territory.<sup>551</sup> JARPA II ended in 2014, with the decision of the ICJ finding that the JARPA programs did not satisfy the definition of ‘for purposes of [scientific research]’.<sup>552</sup>

In the Whaling Commission, scientific whaling is also called ‘special permit’ whaling.<sup>553</sup> Special permit whaling occurs outside the direct regulatory power of the Commission, as issuing special permits is at the discretion of the state.<sup>554</sup> The *Whaling Convention* mandates that any whales killed, taken or treated as part of a scientific whaling permit ‘shall be exempt from the operation of this Convention.’<sup>555</sup> This exempts scientific whaling catches from the operation of the *Schedule*, and so from the commercial whaling moratorium. However, member states that issue special permits are not released from research obligations determined by the *Whaling Convention*.<sup>556</sup> This results in some oversight of the special permits by the Commission and its Scientific Committee, though no veto can be exercised.<sup>557</sup> It is important to clarify *how* the object and purpose applies to scientific whaling, as well as how the Whaling Commission has jurisdiction over scientific whaling.

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<sup>551</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425; Blay and Bubna-Litic, above n 362, 466.

<sup>552</sup> IWC 65<sup>th</sup> Annual Meeting of October 2014, ‘Annual Report of the International Whaling Commission 2014 – covering the July 2012 – October 2014 financial year’ (Portorož, Slovenia, adopted October 2014) [7.5.2] 16; IWC 66<sup>th</sup> Annual Meeting of October 2016, ‘Annual Report of the International Whaling Commission 2016 – covering the October 2014 – October 2016 financial year’ (Portorož, Slovenia, adopted October 2016) [6.2.2], 12.

<sup>553</sup> *Whaling Convention*, Article VIII.

<sup>554</sup> *Whaling Convention*, Article VIII.

<sup>555</sup> *Whaling Convention*, Article VIII.1.

<sup>556</sup> *Whaling Convention*, Article IV and VIII.3.

<sup>557</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226, [83]; *Whaling Convention Schedule*, [30].

There are three primary means by which the scientific whaling programs of the Japanese Cetacean Research Institute (JCR) can or have been brought within the jurisdiction of the Commission. The Whaling Commission provides some regulation through the Scientific Committee by way of oversight of scientific research. This is supported by the *Whaling Case* decision.<sup>558</sup> Article VIII states that where nationals of a member state engage in scientific whaling,<sup>559</sup>

*Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one-year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.*

The ‘such body’ is the Scientific Committee. Article VIII makes clear that scientific research data is to be collected, transmitted and, according to practice, used to support and inform the decisions of the Commission.

The second means is an interpretive means of inclusion, argued here. In accordance with the *Vienna Convention*,<sup>560</sup> all provisions of a treaty must be read in light of the object and purpose.<sup>561</sup> The exclusion of the regulatory powers of the *Whaling Convention* to scientific whaling does not exclude the object and purpose principles from interpreting Article VIII. Interpretation of Article VIII ‘in light of’ the object and purpose entails that scientific whaling permits should contribute to object and purpose principles, including conservation, use, and the development of the whaling industry for future generations.

A third means, a tack taken by many environmental NGOs, is through challenging the nature of scientific whaling programs as being commercial whaling in disguise, and thus not truly within the scope of Article VIII and so subject to the *Schedule* zero catch provision. This is fundamentally a ‘bad faith’ argument centred around the interpretation and use of Article VIII. It is, however, a politically charged argument, and

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<sup>558</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226, [240–241].

<sup>559</sup> *Whaling Convention*, Article VIII.

<sup>560</sup> *Vienna Convention*, Article 31.

<sup>561</sup> *Vienna Convention*, Article 31(1).

not supported by the ICJ decision, by consensus or majority in the Whaling Commission, or by this thesis.

Scientific whaling involves a close examination of the relationship between science and the object and purpose principles of the *Whaling Convention*. Scientific whaling invokes the development of the whaling industry, and the support of whale populations to ensure intergenerational access to whale resources as well as conservation for the purposes of such access and development. The representation of these principles in JARPA was challenged by Commission members and NGOs alike and the question of the purpose of scientific whaling programs in relation to the Convention became a focus of many NGO behaviours.

### 6.3 NGO roles in respect of catch regulation and enforcement

Catch regulation and enforcement in the CAMLR Commission attracted the contributions of environmental, hybrid, and industrial NGOs. Scientific whaling in the Whaling Commission attracted the input of environmental and hybrid NGOs only. This is attributable to development of industry representation in the CAMLR Commission to protect industry interests in the Patagonian toothfish fisheries and the absence of Whaling Commission regulation for commercial whaling since 1986. However, within the environmental NGO category in the Whaling Commission are pro- and anti-whaling advocates.

Environmental NGOs are the most vocal presence in both Commissions, followed by the hybrid, IUCN. The industry NGO, the Coalition of Legal Toothfish Operators (COLTO), has been consistent with input and support since its first attendance at the CAMLR Commission meetings in 2003. COLTO has submitted papers, collaborated with ASOC, used speaking rights, and made practical contributions in support of conservation measures intended to combat IUU fishing. COLTO has challenged the CAMLR Commission on responses - its own, and its individual member state, to IUU fishing, using document submission and speaking rights to draw attention to the object and purpose requirements that bind the member states in combatting IUU fishing.

In the Whaling Commission, environmental NGOs submitted the majority of Opening Statements in the time between 1986 and the final JARPA II whaling expedition in the 2013/2014 Austral summer. There is a clear tendency in the Opening Statements of

environmental NGOs toward opposition to all scientific whaling programs. This was not met with equal and opposite views in the Opening Statements by a pro-whaling environmental NGO supporting scientific whaling.

#### 6.3.1. CAMLR Commission

There has been consistent NGO engagement with the issue of IUU fishing since its first year on the agenda in 1997. The observer NGO behaviour on the issue of IUU fishing included the authorized use of speaking and document submission rights. Due to the complexity and difficulties of pursuit and prevention in the Southern Ocean, an early focus was the development of the port state-based Catch Documentation System (CDS), a key aspect of the CAMLR Commission's approach to combatting IUU fishing. Environmental, hybrid and industrial NGOs contributed to its development. The intersessional conduct of Sea Shepherd in the 2015/2016 Austral summer in pursuit of the *MV Thunder*, a known IUU vessel preying on Patagonian toothfish is also of interest here because it engages with direct enforcement of international law by an NGO.

##### *Document submissions*

Document submissions on IUU fishing were extensive, from the IUCN, ASOC and COLTO. Background Papers informed the Commission of NGO work, contributed political viewpoints to the Commission, and provided advice and information to support the work of the Commission. Most of the Background Papers were uncontentious in nature, however, as will be discussed below, in 2003 COLTO used document submission to challenge the efficacy of several states' domestic efforts to combat IUU fishing.

##### *Oral statements*

Oral statements by the observers to the CAMLR Commission have been permitted each year. In several years, NGOs took advantage of the right to address the agenda item of IUU fishing. The content of these statements has, as with Background Papers, been generally consistent with object and purpose principles, however there were several outliers either displaying a lack of clear adherence to the principles or, as with the 2003 Background Paper from COLTO, were the cause of consternation in the Commission.

##### *Intersessional and enforcement behaviours*

The primary NGO behaviours in the intersessional period were tracking and preventing IUU fishing, IUU fishing methods, and fish catch landings. These behaviours were

engaged in by COLTO and Sea Shepherd. COLTO has a network of informants and it uses available technology to keep track of Patagonian toothfish landings in various ports. COLTO gathers and shares information relevant to the data on which TACs are determined by the Commission during meeting times. Sea Shepherd acted over the 2014/2015 Austral summer, with its vessel the *Bob Barker*. The *Bob Barker* pursued the IUU fishing vessel, the *Thunder*, one of a fleet of vessels known to illegally fish in the Convention Area. The pursuit of the IUU vessel lasted 110 days. The course of the pursuit was reported daily to the CAMLR Commission Secretariat Fisheries Compliance and Enforcement manager, with the whereabouts of the *Thunder*, as well as any salvage by the *Bob Barker* crew of illegal fishing gear and catch.<sup>562</sup> The practical enforcement and preventative assistance of Sea Shepherd and COLTO in carrying out Conservation Measures will be analyzed. Their actions fall in a grey area of international law, and evaluation with reference to legal standards will be valuable if such actions occur again.

#### 6.3.2 Whaling Commission

NGO engagement in relation to scientific whaling can be grouped into three categories: the use of Opening Statements from 1985 to 2016; the use of protest at the 2014 and 2016 meetings in Slovenia; and the direct-action tactics of Sea Shepherd in the Southern Ocean in attempting to prevent whaling activities of Japanese vessels. There was only one use of speaking rights by an environmental NGO on scientific whaling, and this is discussed in the context of the use of Opening Statements.

In 2014, the ICJ found that Japanese scientific whaling was unlawful under the *Whaling Convention*.<sup>563</sup> The issue explored here is how NGO behaviours engaged with the object and purpose. This section does not attempt to revisit the question of the lawfulness of scientific whaling.

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<sup>562</sup> Interview with Interviewee 7 (17 September 2015).

<sup>563</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226; see also Laurence Boisson De Chazournes et al., *Report of the International Panel of Independent Legal Experts On: Special Permit ("Scientific") Whaling Under International Law* (Paris, 12 May 2006).

### 1977-2016 Opening Statements

NGO engagement through Opening Statements in the 1977 – 2016 period came from many anti-whaling environmental NGOs, with some sporadic input from pro-whaling NGOs, the GGT, as well as from the hybrid NGOs, IWMC WCT and IUCN. There were a variety of viewpoints expressed, with many adhering to the object and purpose in terms of the significance of genuine scientific data being central to the rehabilitation of whale stocks for conservation and use purposes. There were opposing views on the value of scientific whaling to the collection of such data<sup>564</sup> Many other statements were accusatory, and simply indicated a belief that the JARPA programs were exploiting a “loophole” in the *Whaling Convention* to continue commercial whaling in the guise of scientific whaling.

The most significant opening statements for object and purpose adherence argued that there was a lack of scientific necessity in scientific whaling because the programs failed to contribute to the environmental and scientific communities’ efforts to rehabilitate whale stocks for future interests. This argument was later mirrored in the single NGO intervention on scientific whaling.

While environmental NGOs underplayed the commercial and lethal aspects of future interests, the need for rehabilitation of whale stocks was emphasized and the failure of scientific whaling schemes to support that object and purpose principle was highlighted.<sup>565</sup> This is an object and purpose compliant argument, as it demands that

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<sup>564</sup> CSI formerly CCS, *Opening Statement by Cetacean Society International (formerly CCS)* IWC/38/OS CSI (1986); IWMC, *IWC: A System of Loopholes* IWC/56/OS IWMC (2004); WWF, *WWF Opening Statement* IWC/56/OS WWF (2004); ITF, *Opening Statement by the International Transport Workers’ Federation* IWC/57/OS ITF (2005); AJSU, *All Japan Seamen’s Union Opening Statement* IWC/57/OS JSU (2005); Natural Resources Defense Council, *NRDC Opening Statement* IWC/57/OS NRDC (2005); WWF, *WWF Opening Statement* IWC/57/OS WWF (2005); All Japan Seamen’s Union, *Opening Statement to the 58<sup>th</sup> Meeting of the IWC* IWC/58/OS JSU (2006); WWF, *Opening Statement: 58<sup>th</sup> meeting of the IWC* IWC/58/OS WWF (2006); Natural Resources Defense Council, *Opening Statement* IWC/59/OS (2007); SMS, *Species Management Specialist Opening Statement* IWC/60/OS SMS (2008); Instituto de Conservación de Ballenas, *Opening Statement to the 61<sup>st</sup> Meeting of the IWC* IWC/61/OS ICB (2009); Greenpeace, *Greenpeace Opening Statement* IWC/65/OS Greenpeace (2014).

<sup>565</sup> Instituto de Conservación de Ballenas (ICB), *Intervention on Procedures used by the Scientific Committee for reviewing special permits at the IWC66 meeting* (Agenda item 14.3) (IWC66, Portorož, Slovenia, 27 October 2016).

there be sufficient scrutiny of scientific whaling programs to indicate that the programs can support the underlying principles of the Commission's work.

#### *2014 and 2016 protests at Whaling Commission meetings*

The informal use of protest at the 2014 and 2016 meetings in Slovenia involved the use of placards to make representations about scientific whaling, including that the proposed NEW-REP A research plan was 'the new rape' of the Southern Ocean.<sup>566</sup> The positions espoused on various banners indicated a broader view on the scientific whaling issue than that defined by the *Whaling Convention*. The protests demonstrated the broad polemical arguments put forward by anti-whaling environmental NGOs, with little reference to the object and purpose principles. The lack of reference to the terms of the convention indicated a lack of interest in the carrying out of the Commission's legal duties. Instead, demonstrators presented a political viewpoint, that while perhaps of moral value presented little in the way of object and purpose engagement.<sup>567</sup>

#### *2005 – 2014 enforcement at sea: Sea Shepherd and the JARPA II vessels*

Sea Shepherd waged a series of campaigns in the Austral summers from 2005 to 2014. They protested and interfered with Japanese scientific whaling vessels in the Southern Ocean. Sea Shepherd, justifying their actions as legitimate under various international legal instruments, particularly Agenda 21.<sup>568</sup> Sea Shepherd demonstrated commitment to rehabilitation of whale stocks and an interest in an ecosystem and precautionary approaches, consistent with trends in international environmental law. However, the broader dialogue espoused by Sea Shepherd founder, Paul Watson in his position as spokesman for the organization, demonstrated concern for principles and ideas outside those governing the Whaling Commission, such as the primacy of the 'laws of nature'

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<sup>566</sup> See Figure 6.1 at page 219.

<sup>567</sup> Jethro W Brown, 'Sovereignty' (1906-1907) 18(5) *Juridical Review* 1.

<sup>568</sup> Sea Shepherd Conservation Society, *International Laws and Charters* (2018) Sea Shepherd Australia <https://www.seashepherd.org.au/who-we-are/about-us/laws-and-charters.html>.

over the 'laws of man', and a commitment to veganism that excludes any lethal use of cetaceans, or other animals.<sup>569</sup>

#### 6.4 Do NGO enforcement and regulation activities promote the object and purpose of the CAMLR convention?

NGO submissions to the Commission can be assessed in terms of the object and purpose principles of the *CAMLR Convention*. In analysing formal roles, key indicators of concordance with the object and purpose require NGO contributions to refer to primary principles of conservation and rational use, evince a precautionary approach founded in scientific data, that contributes to the long-term health and useability of ecosystems and marine living resources.

To demonstrate accordance with the object and purpose principles, NGO contributions should therefore:

1. *Recognise* the interests of states in the **use** of marine living resources (MLR);
2. *Cite* credible **scientific** data and sources in addressing IUU fishing;
3. *Refrain* from pushing beyond the boundaries of the precautionary and ecosystem approaches to argue for **conservation for conservation's sake**; and
4. *Consider* **rational use** or *not exclude* it from conservation advocacy.

NGOs roles bearing on IUU fishing in the CAMLR Commission are evaluated by reference to these criteria.

##### 6.4.1 ASOC

ASOC made numerous oral statements and submitted numerous background papers to the CAMLR Commission from 1997 to 2017. The content of both was largely supportive of object and purpose principles. The first significant statement from ASOC on IUU fishing was in 1997. ASOC expressed a belief that until IUU fishing was brought under control, the Commission had 'no choice but to set zero TACs'.<sup>570</sup> This was on the basis of

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<sup>569</sup> Paul Watson, 'On the Precedence of Natural Law' (1988) 3 *Journal of Environmental Law and Litigation* 79.

<sup>570</sup> *CCAMLR-XVI Meeting of 27 October – 7 November 1997*, 'Report of the Sixteenth Meeting of the Commission' (Hobart, Australia, adopted 7 November 1997) [12.9].



the inadequacy of the IUU catch estimates used by the Commission for setting its TACs.<sup>571</sup> The language used connected to the principles of the *CAMLR Convention*, referencing the need for precaution and appealing to the need to make decisions grounded in scientific data. The statement indicated a concern for whether the conservation and rational use balance of Article II could be met in respect of IUU fishing.

The Commission answered ASOC's concerns the following year.<sup>572</sup> Using object and purpose-oriented language, the Commission referred to the advice it received from its Scientific Committee. It stated that decisions were 'based on the best available data' and that conservation measures effectively addressed IUU fishing without impacting on legitimate fishing.<sup>573</sup> Up until this point, ASOC's position adhered to the object and purpose principles, and discharged its Article XXIII NGO role of supportive contributions. ASOC was supporting the Commission to consider its own decisions in light of its object and purpose. However, when the Commission answered the concerns of ASOC, further criticism ceased to fulfil the role of an NGO under Article XXIII because it was no longer assisting the Commission, it was hectoring the Commission. ASOC maintained the critical position in 1999, stating that:<sup>574</sup>

*a crucial step towards ending IUU fishing is for CCAMLR to place a moratorium on legal fisheries for Dissostichus spp. [Patagonian and Antarctic toothfish] Such a moratorium would require concomitant trade sanctions under the Convention on International Trade in Endangered Species (CITES). ... it makes no sense to conduct 'legal' fishing when the real catch is already far above what CCAMLR itself estimates as a precautionary level...the moratorium should be maintained until such time as IUU fishing has been eliminated, all Dissostichus spp. stock parameters are available, a trade system for the verification of catch origin is in place and incidental catches of seabirds are eliminated.*

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<sup>571</sup> *CCAMLR-XVI Meeting of 27 October – 7 November 1997*, 'Report of the Sixteenth Meeting of the Commission' (Hobart, Australia, adopted 7 November 1997) [12.9].

<sup>572</sup> *CCAMLR-XVII Meeting of 26 October – 6 November 1998*, 'Report of the Seventeenth Meeting of the Commission' (Hobart, Australia, adopted 6 November 1998) [12.18].

<sup>573</sup> *CCAMLR-XVII Meeting of 26 October – 6 November 1998*, 'Report of the Seventeenth Meeting of the Commission' (Hobart, Australia, adopted 6 November 1998) [12.19].

<sup>574</sup> *CCAMLR-XVIII Meeting of 25 October – 5 November 1999*, 'Report of the Eighteenth Meeting of the Commission' (Hobart, Australia, adopted 5 November 1999) [12.3].

There are several issues here. The continued repetition of calling for a moratorium dismissed the Scientific Committee in supporting Commission decision-making. The statement implied that the set TACs were not 'rational use'. The subordination of the jurisdiction of the CAMLR Commission to a cooperative relationship with CITES ignores the exclusivity of the ATS as a legal system. Finally, the statement inherently criticizes the Commission as failing to meet its own mandate, despite the Commission's clear response to previous years' criticisms clarifying its means of addressing its own mandate.<sup>575</sup>

In 2001, when the Catch Document Scheme (CDS) was developed, ASOC supported implementation and improvement of the CDS.<sup>576</sup> ASOC also aligned its recommendations with the work of the Commission in a manner indicative of both object and purpose compliant Article XXIII roles, and object and purpose compliant content.<sup>577</sup> Speaking to its written paper, on evaluation of the CDS, the ASOC representative highlighted extensive and useful recommendations<sup>578</sup> to increase data reliability, improve compliance effectiveness, and develop enforcement mechanisms to ensure conservation within the Convention Area would be compatible with the legal (rational use) toothfish fisheries.<sup>579</sup> This represents a shift toward compliance with Article XXIII roles. The content also adhered to the object and purpose principles, with functional contributions to the work of the Commission.

From 2001 – 2017, oral statements of ASOC contained clear connections to the object and purpose principles. In 2002, a statement on IUU fishing drew specific connections between the regulation of Patagonian toothfish stocks and the conservation principles

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<sup>575</sup> *CCAMLR-XIX Meeting of 23 October – 3 November 2000*, 'Report of the Nineteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November 2000) [12.17]. ASOC relinquished this position after the 2000 meeting.

<sup>576</sup> *CCAMLR-XX Meeting of 22 October – 2 November 2001*, 'Report of the Twentieth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2001) [12.11].

<sup>577</sup> ASOC, *ASOC evaluation of CDS CCAMLR-XX/BG/20* (2001).

<sup>578</sup> 'Chile expressed appreciation for ASOC's proposals for improvements to the CDS': *CCAMLR-XX Meeting of 22 October – 2 November 2001*, 'Report of the Twentieth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2001) [2.77].

<sup>579</sup> *CCAMLR-XX Meeting of 22 October – 2 November 2001*, 'Report of the Twentieth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2001) [2.76].

of Article II of the Convention.<sup>580</sup> The supportive position of ASOC was acknowledged by Commission members,<sup>581</sup> in contrast to earlier views.<sup>582</sup> However, from 2003, the general purpose of statements was to introduce documentary submissions and iterate the content of those papers in lieu of original oral contributions.<sup>583</sup> These were uncontentious in nature, as the question of object and purpose compliance was diverted to the content of the Background Papers. Thus, it is possible to say that for the 2003-2017 period IUU fishing oral statements from ASOC were generally compliant with a supportive role under Article XXIII but contained little evaluable content.<sup>584</sup> This overall

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<sup>580</sup> *CCAMLR-XXI Meeting of 21 October – 1 November 2002*, 'Report of the Twenty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2002) [14.7].

<sup>581</sup> *CCAMLR-XX Meeting of 22 October – 2 November 2001*, 'Report of the Twentieth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2001) [2.77]; *CCAMLR-XXI Meeting of 21 October – 1 November 2002*, 'Report of the Twenty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2002) [14.9] [14.12].

<sup>582</sup> *CCAMLR-XIV Meeting of 24 October – 3 November 1995*, 'Report of the Fourteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November 1995) [14.3] Japan disapproved of some policy statements made in a Background Paper; *CCAMLR-XVII Meeting of 26 October – 6 November 1998*, 'Report of the Seventeenth Meeting of the Commission' (Hobart, Australia, adopted 6 November 1998) [2.15], [12.22] – [12.27].

<sup>583</sup> *CCAMLR-XXII Meeting of 27 October – 7 November 2003*, 'Report of the Twenty-Second Meeting of the Commission' (Hobart, Australia, adopted 7 November 2003) [14.24].

<sup>584</sup> *CCAMLR-XXIV Meeting of 24 October – 4 November 2005*, 'Report of the Meeting of the Twenty-Fourth Commission' (Hobart, Australia, adopted 4 November 2005) [15.12]; *CCAMLR-XXV Meeting of 23 October – 3 November 2006*, 'Report of the Twenty-Fifth Meeting of the Commission' (Hobart, Australia, adopted 3 November 2006) [16.9]; *CCAMLR-XXVI Meeting of 22 October – 2 November 2007*, 'Report of the Twenty-Sixth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2007) [13.39], [16.5]; *CCAMLR-XXVII Meeting of 27 October – 7 November 2008*, 'Report of the Twenty-Seventh Meeting of the Commission' (Hobart, Australia, adopted 7 November 2008) [16.8]; *CCAMLR-XXVIII Meeting of 26 October – 6 November 2009*, 'Report of the Twenty-Eight Meeting of the Commission' (Hobart, Australia, adopted 6 November 2009) [15.13]; *CCAMLR-XXIX Meeting of 25 October – 5 November 2010*, 'Report of the Twenty-Ninth Meeting of the Commission' (Hobart, Australia, adopted 5 November 2010) [9.30]; *CCAMLR-XXX Meeting of 24 October – 4 November 2011*, 'Report of the Thirtieth Meeting of the Commission' (Hobart, Australia, adopted 4 November 2011) [14.2]; *CCAMLR-XXXII Meeting of 23 October – 1 November 2013*, 'Report of the Thirty-Second Meeting of the Commission' (Hobart, Australia, adopted 1 November 2013) [9.8]; *CCAMLR-XXXIII Meeting of 20 – 31 October 2014*, 'Report of the Thirty-Third Meeting of the Commission' (Hobart, Australia, adopted 31 October 2014) [9.12]; *CCAMLR-XXXIV*

shift toward Background Papers did not prevent ASOC making critical commentary, in reminding the Commission of the conservation mandate it sought to apply.<sup>585</sup> However, these were isolated, and not representative of overall conduct.

From 1997, ASOC submitted extensive Background Papers on IUU fishing.<sup>586</sup> Issues addressed included the CDS and port state measures (PSM),<sup>587</sup> VMS,<sup>588</sup> IUU vessel

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*Meeting of 19-30 October 2015, 'Report of the Thirty-Fourth Meeting of the Commission' (Hobart, Australia, adopted 30 October 2015) [10.8].*

<sup>585</sup> *CCAMLR-XXIII Meeting of 25 October – 5 November 2004, 'Report of the Twenty-Third Meeting of the Commission' (Hobart, Australia, adopted 5 November 2004) [14.17]; CCAMLR-XXIV Meeting of 24 October – 4 November 2005, 'Report of the Meeting of the Twenty-Fourth Commission' (Hobart, Australia, adopted 4 November 2005) [15.12].*

<sup>586</sup> *ASOC, The international trade in Patagonian toothfish: international involvement, concerns and recommendations CCAMLR-XVII/BG/12 (1998); ASOC, ISOFISH Occasional Report No. 1 CCAMLR-XVII/BG/49 (1998); ASOC, ISOFISH Occasional Report No. 3 CCAMLR-XVII/BG/50 (1998); ASOC, Illegal, unregulated, unreported toothfish catch estimates for the Australian EEZ around Heard and McDonald Islands 1 July 2000-30 June 2001 CCAMLR-XX/BG/19 (2001); ASOC, Position statement on listing toothfish under Appendix II of the CITES CCAMLR-XXI/BG/29 (2002); ASOC, Measures to prevent and deter illegal, unreported and unregulated fishing CCAMLR-XXV/BG/28 (2006); ASOC, CCAMLR's role in combating IUU fishing in the Southern Ocean and globally CCAMLR-XXIX/BG/20 (2010); ASOC, CCAMLR's next steps to stop IUU fishing CCAMLR-XXX/BG/22 (2011); ASOC, Old challenges, new leadership: CCAMLR and the fight against IUU fishing in the Southern Ocean and beyond CCAMLR-XXXI/BG/16 (2012).*

<sup>587</sup> *ASOC, The ASOC evaluation of the CDS CCAMLR-XIX/BG/29 Rev. 1 & Addendum (2000); ASOC, Trade measures and IUU Fishing CCAMLR-XIX/BG/37 (2000); ASOC, ASOC evaluation of CDS CCAMLR-XX/BG/20 (2001); ASOC, The application of Port State jurisdiction CCAMLR-XXI/BG/20 (2002); ASOC, Illegal toothfish trade: introducing illegal catches into the market CCAMLR-XXIII/BG/27 Rev. 2 (2004); ASOC, The use of Port State measures to improve fisheries compliance at the international level issues and instruments – the CCAMLR case CCAMLR-XXV/BG/29 (2006); ASOC, The use of trade-related measures to deter IUU fishing: a step ahead for CCAMLR CCAMLR-XXVI/BG/26 (2007); ASOC, The Need for Trade Measures in CCAMLR CCAMLR-XXVII/BG/28 (2008); ASOC, Gap analysis: comparing CCAMLR's port state measures with those in the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing CCAMLR-XXIX/BG/25 (2010).*

<sup>588</sup> *ASOC, Managing fishing vessels CCAMLR-XXIX/BG/22 (2010); ASOC, Establishing proper fishing vessel governance and control in the CCAMLR Area CCAMLR-XXXI/BG/13 (2012); ASOC, Proposals for the governance and control of fishing vessels and fishing support vessels operating in the Southern Ocean CCAMLR-XXXII/BG/18 (2013); ASOC, Proposals on improving the governance and control of fishing vessels operating in the Southern Ocean CCAMLR-XXXIII/BG/22 rev. 1 (2014); ASOC, Progress on Southern Ocean*

register,<sup>589</sup> and attempts to create an enforcement regime for the Convention Area<sup>590</sup> The tenor of documentary submissions has varied, with early contributions mirroring the oral statements calling for a moratorium on commercial toothfish fishing.

The development of a cooperative relationship between ASOC and COLTO to support the work of the Commission clearly works from an object and purpose standpoint, as both conservation and use concerns are represented in this partnership.<sup>591</sup> But other papers also underscored the development of a nuanced approach to supporting the Commission in combatting IUU. In 2016, ASOC submitted a paper that considered the integration of MPAs with continued fishing interests as a mechanism to support legal fishing.<sup>592</sup>

Beginning with the ISOFISH Occasional Reports submitted in 1998, ASOC used document submission as a means of drawing the Commission's attention to significant players and issues within the IUU fishing problem. The use of Mauritian ports for

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*protection and vessel activity CCAMLR-XXXV/BG/25 (2016); ASOC, Polar Code Phase 2 and next steps for Southern Ocean vessel management CCAMLR-XXXVI/BG/26 (2017).*

<sup>589</sup> ASOC, *A CCAMLR response to use of flags of convenience by IUU vessels in the Convention Area* CCAMLR-XXI/BG/30 (2002); ASOC, *Port visits of vessels on CCAMLR's IUU vessel lists: lessons on port state performance* CCAMLR-XXVIII/BG/31 Rev. 1 (2009); ASOC, *The Hongjin 707: Case study and recommended next steps for CCAMLR* CCAMLR-XXXV/BG/08 (2016).

<sup>590</sup> ASOC, *Antarctic and Southern Ocean Coalition Paper on the creation of a CCAMLR enforcement regime* CCAMLR-XVI/BG/38 (1997); ASOC, *A renewed strategy to combat IUU Fishing in the Southern Ocean* CCAMLR-XXVIII/BG/32 (2009); ASOC and COLTO, *Working together to end illegal, unreported and unregulated fishing in the Southern Ocean* CCAMLR-XXXIII/BG/23 (2014); ASOC and COLTO, *Collaborating to eliminate Illegal, Unreported and Unregulated fishing in the Southern Ocean* CCAMLR-XXXIV/BG/23 (2015); ASOC and COLTO, *Collaborating to eliminate Illegal, Unreported and Unregulated (IUU) fishing in the Southern Ocean* CCAMLR-XXXV/BG/27 (2016).

<sup>591</sup> ASOC and COLTO, *Working together to end illegal, unreported and unregulated fishing in the Southern Ocean* CCAMLR-XXXIII/BG/23 (2014); ASOC and COLTO, *Collaborating to eliminate Illegal, Unreported and Unregulated fishing in the Southern Ocean* CCAMLR-XXXIV/BG/23 (2015); ASOC and COLTO, *Collaborating to eliminate Illegal, Unreported and Unregulated (IUU) fishing in the Southern Ocean* CCAMLR-XXXV/BG/27 (2016).

<sup>592</sup> ASOC, *How fishing and marine protection can coexist in the Southern Ocean: An economic analysis of the Ross Sea and East Antarctic MPA proposals* CCAMLR-XXXV/BG/23 (17 September 2016).

unloading IUU fishing hauls was drawn to the Commission's attention,<sup>593</sup> as was the involvement of several Norwegian companies and prominent individuals in IUU fishing in the Southern Ocean.<sup>594</sup> Both reports were critical of the issues, but both reports also made clear suggestions for ways to address them. Object and purpose language was not used, but the clear concern for upholding the regulatory framework of the *CAMLR Convention* is apparent. Inherently, submissions that seek to assist the Commission in combatting IUU fishing, which prevents rational use and conservation, will promote the object and purpose of the Convention.

This position of ASOC is replicated throughout their contributions. The reviews of the CDS are examples of the support of ASOC for the principles of the *CAMLR Convention*, wherein ASOC sought to improve measures to prevent IUU fishing by identifying gaps in the CDS that undermined the central goal of preventing IUU fish being landed.<sup>595</sup> Similarly, Background Papers on port state jurisdiction,<sup>596</sup> and ways in which the Commission could integrate its conservation efforts with other international conventions,<sup>597</sup> sought clearly to balance object and purpose concerns to create a sustainable management system. These, and other background papers demonstrate ASOC's capacity to engage fully both with Article XXIII responsibilities and the object and purpose principles.

The 2006 document '*Measures to prevent and deter IUU fishing*', contains the whole approach of ASOC to IUU fishing.<sup>598</sup> The position of ASOC is supportive of the object and purpose and the Commission. It recommends how Commission work can make effective use of various schemes in place, including the CDS, VMS and the port state measures available to the Commission through non-contracting and contracting parties.

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<sup>593</sup> ASOC, *ISOFISH Occasional Report No. 1* CCAMLR-XVII/BG/49 (1998).

<sup>594</sup> ASOC, *ISOFISH Occasional Report No. 3* CCAMLR-XVII/BG/50 (1998).

<sup>595</sup> ASOC, *The ASOC evaluation of the CDS* CCAMLR-XIX/BG/29 Rev. 1 & Addendum (2000); ASOC, *ASOC evaluation of CDS* CCAMLR-XX/BG/20 (2001).

<sup>596</sup> ASOC, *The application of Port State jurisdiction* CCAMLR-XXI/BG/20 (2002).

<sup>597</sup> ASOC, *Position statement on listing toothfish under Appendix II of the CITES* CCAMLR-XXI/BG/29 (2002).

<sup>598</sup> ASOC, *Measures to prevent and deter illegal, unreported and unregulated fishing* CCAMLR-XXV/BG/28 (2006).

The document is clearly adherent to the designated supporter role of an observer NGO, as it seeks to assist rather than shift the approach of the Commission to IUU fishing.

In summary, ASOC's documentary submission are clearly supportive of the object and purpose of the CAMLR Commission. While there were some early missteps in oral statements, criticism was constructive, and recommendations were made without attempting to over-emphasise conservation to the detriment of a sustainable use of fisheries.

#### 6.4.2 Hybrid NGOs: IUCN and IWMC WCT

The IUCN has contributed broadly across the IUU fishing matter in the CAMLR Commission, although the contributions have not been extensive. The roles of the IUCN have also been entirely consistent with the supportive and cooperative position delegated to NGOs that work with the Commission.

The first contribution from the IUCN on the topic of IUU fishing was in 1995, with an oral statement from its meeting delegate on the pressing nature of the matter.<sup>599</sup> In 1996 the IUCN offered support to the Commission in the form of the IUCN's General Assembly resolutions about combatting IUU fishing.<sup>600</sup> From 1997 to 2008,<sup>601</sup> the IUCN variously expressed 'deep concern'<sup>602</sup>, 'support of CCAMLR's efforts',<sup>603</sup> the urgency of 'strong and effective action',<sup>604</sup> disappointment that stronger action had not been

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<sup>599</sup> *CCAMLR-XIV Meeting of 24 October – 3 November 1995*, 'Report of the Fourteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November 1995), [11.9] – [11.10], [11.11], [14.2] – Chile lodged a reservation to the participation of the IUCN.

<sup>600</sup> *CCAMLR-XV Meeting of 21 October – 1 November 1996*, 'Report of the Fifteenth Meeting of the Commission' (Hobart, Australia, adopted 1 November 1996) [11.14].

<sup>601</sup> Oral and written submissions from the IUCN on IUU fishing ceased after this time.

<sup>602</sup> *CCAMLR-XVI Meeting of 27 October – 7 November 1997*, 'Report of the Sixteenth Meeting of the Commission' (Hobart, Australia, adopted 7 November 1997) [12.10].

<sup>603</sup> *CCAMLR-XIX Meeting of 23 October – 3 November 2000*, 'Report of the Nineteenth Meeting of the Commission' (Hobart, Australia, adopted 3 November 2000) [12.12].

<sup>604</sup> *Ibid* [12.14].

taken,<sup>605</sup> ‘welcome’ for progress on IUU,<sup>606</sup> appreciation for ‘the continued and exemplary efforts’<sup>607</sup>, and readiness and willingness ‘to assist CCAMLR’.<sup>608</sup>

IUCN’s support, apparent in its oral statements, is reinforced by Background Papers encouraging the Commission to develop conservation measures and the CDS to combat IUU fishing. The IUCN generally deferred to the Commission but did provide some critical commentary in hopes of the Commission’s work better carrying out the Commission’s mandate.<sup>609</sup>

From 1996, the IUCN contributed numerous papers supportive of the implementation and ongoing assessment and refinement of conservation measures countering IUU fishing and its impacts in the Southern Ocean.<sup>610</sup> IUCN papers supported the object and

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<sup>605</sup> *CCAMLR-XX Meeting of 22 October – 2 November 2001*, ‘Report of the Twentieth Meeting of the Commission’ (Hobart, Australia, adopted 2 November 2001) [12.14].

<sup>606</sup> *CCAMLR-XXV Meeting of 23 October – 3 November 2006*, ‘Report of the Twenty-Fifth Meeting of the Commission’ (Hobart, Australia, adopted 3 November 2006) [16.8].

<sup>607</sup> *CCAMLR-XXVI Meeting of 22 October – 2 November 2007*, ‘Report of the Twenty-Sixth Meeting of the Commission’ (Hobart, Australia, adopted 2 November 2007) [16.3].

<sup>608</sup> *CCAMLR-XXVII Meeting of 27 October – 7 November 2008*, ‘Report of the Twenty-Seventh Meeting of the Commission’ (Hobart, Australia, adopted 7 November 2008) [16.14].

<sup>609</sup> IUCN, *Patagonian toothfish – are conservation and trade measures working?* CCAMLR-XX/BG/28(2001); IUCN, *Antarctic toothfish – an analysis of management, catch and trade* CCAMLR-XX/BG/29(2001); IUCN, *The use of trade related measures in fisheries management* CCAMLR-XXVII//BG/37 (2008); IUCN, *Continuing CCAMLR’s fight against IUU fishing for toothfish executive summary of the corporate by TRAFFIC international and WWF* CCAMLR-XXVII/BG/38 (2008).

<sup>610</sup> IUCN, *The CDS under WTO rules* CCAMLR-XVIII/BG/48 (1999); IUCN, *Report of the World Conservation Union (IUCN) to the XVIII<sup>th</sup> meeting of CCAMLR* SC-CAMLR/XVIII/BG/13 (1999) 2-3; IUCN, *Report to the Nineteenth Meeting* CCAMLR-XIX/BG/41 (2000) 2-3, indicates support of CCAMLR to combat IUU fishing and its impacts in resolutions of the IUCN General Assembly; IUCN, *CCAMLR-related resolutions adopted by IUCN at the 2<sup>nd</sup> World Conservation Congress* CCAMLR-XIX/BG/46 (2000) provides the text of various IUCN General Assembly resolutions, including *Pirate Fishing and Seabird Mortality from Longlining in the Southern Ocean and Adjacent Waters* (CGR2.PR049) and *Promoting Sustainable Fisheries* (CGR2.CNV021); IUCN, *Patagonian Toothfish – are conservation and trade measures working?* CCAMLR-XX/BG/28 (2001); IUCN, *Patagonian Toothfish – are conservation and trade measures working?* CCAMLR-XX/BG/28 Addendum (2001); IUCN, *Antarctic Toothfish – an analysis of management, catch and trade* CCAMLR-XX/BG/29 (2001); IUCN, *Antarctic Toothfish – an analysis of*



purpose principles of the *CAMLR Convention* by highlighting sustainable use and conservation. IUCN assisted the Commission with assessment of conservation measure effectiveness, as well as providing greater access to the best possible information for decision-making. Examples of this are particularly clear with the CDS reviews,<sup>611</sup> and the emphasis on Commission decision-making relying on accurate estimates of IUU fishing catch within the Convention Area.<sup>612</sup>

There were clear attempts to support the Commission through suggested amendments to conservation measures<sup>613</sup> and suggested ways of improving the value of CDS data.<sup>614</sup> These were adherent to the roles permitted to NGOs under Article XXIII, and clearly supportive of the overall conservation and use principles of the *CAMLR Convention*. The papers recognized the work of the Commission as the primary determiner of content and sought to support conservation and use of marine resources with reference to best practice and complete data.

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*management, catch and trade* CCAMLR-XX/BG/29 Addendum (2001); IUCN, *Report of the World Conservation Union (IUCN) 21<sup>st</sup> meeting* CCAMLR-XXI/BG/34 (2002); IUCN, *Fishery activities and trade of Patagonian Toothfish in South America: a regional perspective* CCAMLR-XXI/BG/38 Rev 1 (2002); IUCN, *Marine fish and the Twelfth Meeting of the Conference of the Parties to CITES, Santiago Chile 2002* CCAMLR-XXI/BG/39 (2002); IUCN, *Recommendations on the format of annual summaries of data compiled from the CCAMLR CDS* CCAMLR-XXII/BG/26 (2003); IUCN, *Report of the IUCN* CCAMLR-XXII/BG/44 (2003); IUCN, *Report of the IUCN to the CCAMLR* CCAMLR-XXIV/BG/44 (2005); IUCN, *Area-based conservation and management measures utilised under CCAMLR* CCAMLR-XXV/BG/18 (2006); IUCN, *Report of the IUCN* CCAMLR-XXVI/BG/44 (2007); IUCN, *The use of trade-related measures in fisheries management* CCAMLR-XXVII/BG/37 (2008); IUCN, *Continuing CCAMLR's fight against IUU fishing for toothfish. Executive summary of the report by TRAFFIC Int'l and WWF Aust* CCAMLR-XXVII/BG/38 (2008).

<sup>611</sup> CCAMLR-XX Meeting of 22 October – 2 November 2001, 'Report of the Twentieth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2001) [12.13].

<sup>612</sup> *Ibid* [12.13]; IUCN, *Continuing CCAMLR's fight against IUU fishing for toothfish. Exec sum of the report by TRAFFIC Int'l and WWF Aust* CCAMLR-XXVII/BG/38 (2008).

<sup>613</sup> IUCN, *Continuing CCAMLR's fight against IUU fishing for toothfish. Executive summary of the report by TRAFFIC Int'l and WWF Aust* CCAMLR-XXVII/BG/38 (2008).

<sup>614</sup> IUCN, *Recommendations on the format of annual summaries of data compiled from the CCAMLR CDS* CCAMLR-XXII/BG/26 (2003).

#### 6.4.3 Industry NGO – COLTO

COLTO appeared in the Commission record in 2003, and its contributions, both oral and documentary have been geared toward the self-interest of legal toothfish operators in preventing IUU fishing and ensuring the sustainability of toothfish stocks in the Convention Area.

COLTO has used oral statements to affirm its purpose and commitment to contributing to the work of the CCAMLR Commission, as well as to introduce papers. For example, in 2003, with the submission of the *Rogues Gallery*, COLTO introduced the document in an oral statement but the content, which caused significant uproar,<sup>615</sup> was contained in a Background Paper. The *Rogues Gallery* identified several vessels allegedly engaged in IUU fishing.<sup>616</sup> Several were flagged to member states of the Commission.

In introducing the *Rogues Gallery*, COLTO took the opportunity to inform the Commission of its objective. It said that COLTO was established<sup>617</sup>

*...to work with CCAMLR Members and other authorities to eliminate IUU fishing for toothfish in order to sustain toothfish stocks, seabird populations and the livelihoods of legal fisherman.*

It further stated COLTO was established ‘as a result of delays by governments to take effective action against IUU fishing for toothfish.’<sup>618</sup>

These two statements accord directly with Articles II and XXIII. Support was being proffered for the Commission’s work in accordance with the Commission’s object and purpose principles. The statement highlighted that COLTO had provided ‘significant

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<sup>615</sup> CCAMLR-XXII Meeting of 27 October – 7 November 2003, ‘Report of the Twenty-Second Meeting of the Commission’ (Hobart, Australia, adopted 7 November 2003) [14.28] – [14.33].

<sup>616</sup> COLTO, *Rogues’ Gallery* CCAMLR-XXII/BG/42 (2003) *withdrawn*; COLTO, *Rogues Gallery – The new face of IUU fishing for toothfish* [not in official documentation] CCAMLR XXII (2003) (no date) <https://www.colto.org/wp-content/uploads/2013/01/Rogues-Gallery-Final.pdf> (‘*Rogues’ Gallery*’).

<sup>617</sup> CCAMLR-XXII Meeting of 27 October – 7 November 2003, ‘Report of the Twenty-Second Meeting of the Commission’ (Hobart, Australia, adopted 7 November 2003) [14.25].

<sup>618</sup> *Ibid.*

amounts of information on IUU fishing to relevant authorities'<sup>619</sup> and intended to continue to work with 'governments, industry, non-government organizations and any other parties'.<sup>620</sup> Support of the object and purpose is effectively the purpose of COLTO, which is to 'promote sustainable fishing [Article II.2] in an environmentally responsible manner [ecosystem and precautionary approaches]'.<sup>621</sup>

A warm response was extended by many member states to COLTO's willingness and ability to assist the Commission and its members in combatting IUU. However, the introduction of the *Rogues Gallery* was also met with significant disapprobation. The paper was withdrawn by COLTO in response to the extensive criticism of member states.<sup>622</sup> However, the paper had the effect of forcing the Commission as a whole to recognize what COLTO termed 'delays' to effective government responses to IUU fishing. Through an object and purpose analysis, COLTO clearly supports the Commission and its object and purpose principles. However, it was willing to call to account any state parties that failed to demonstrate commitment to the same principles and work. By an object and purpose analysis, the extent to which an actor supports the legal mandate is measured, rather than measuring the political desirability of a response.

Since 2003, COLTO has continued to use oral statements to highlight its adherence to the principles governing the work of the Commission. In 2005, the COLTO representative stated 'we remain dedicated to providing assistance to CAMLR to eliminate IUU wherever possible.'<sup>623</sup> This indicates close attention to the terms of

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<sup>619</sup> *Ibid* [14.26].

<sup>620</sup> *Ibid* [14.27].

<sup>621</sup> *Ibid*.

<sup>622</sup> *Ibid*; supportive members: USA [14.34] New Zealand [14.37] France [14.40] United Kingdom [14.41-14.42]; critical members: Uruguay [14.28] China [14.29] Chile [14.30] Korea [14.31] Russia [14.32] Spain [14.33] Namibia [14.35] Mauritius [14.39]; neutral members: the European community [14.36] Argentina [14.38]; withdrawal [14.43].

<sup>623</sup> *CCAMLR-XXIV Meeting of 24 October – 4 November 2005*, 'Report of the Meeting of the Twenty-Fourth Commission' (Hobart, Australia, adopted 4 November 2005) [15.13].

Article XXIII, as did oral statements in other years.<sup>624</sup> Statements in a number of years clearly mark the support of COLTO for the object and purpose principles in their work on IUU. COLTO noted it had contributed to a workshop on IUU,<sup>625</sup> it had contributed funds to encourage monitoring of toothfish stock among commercial operators and continued to support various measures to prevent IUU fishing.<sup>626</sup>

In 2009, COLTO raised the issue of applying treaty interpretation and emphasized an interpretation of the *CAMLR Convention* that took account of ‘rational use’ within Article II. COLTO rejected what it called ‘arbitrary standards’ of judging conservation aims and issues<sup>627</sup> and sought for the Commission to confirm an approach to fisheries regulation that would emphasise ‘the more appropriate aspects under Article II of our Convention which support sustainable conservation, including rational use.’<sup>628</sup> While this statement is clearly self-interested, it is also object and purpose supportive. Self-interest is irrelevant to object and purpose analysis. Not only do the COLTO statements of that year adhere to the text of Article II, they adhere to the intentions of the drafters of the

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<sup>624</sup> *CCAMLR-XXIII Meeting of 25 October – 5 November 2004*, ‘Report of the Twenty-Third Meeting of the Commission’ (Hobart, Australia, adopted 5 November 2004) [14.18]; *CCAMLR-XXV Meeting of 23 October – 3 November 2006*, ‘Report of the Twenty-Fifth Meeting of the Commission’ (Hobart, Australia, adopted 3 November 2006) [16.14]; *CCAMLR-XXVI Meeting of 22 October – 2 November 2007*, ‘Report of the Twenty-Sixth Meeting of the Commission’ (Hobart, Australia, adopted 2 November 2007) [16.10]; *CCAMLR-XXXI Meeting of 23 October – 1 November 2012*, ‘Report of the Thirty-First Meeting of the Commission’ (Hobart, Australia, adopted 1 November 2012) [9.7].

<sup>625</sup> *CCAMLR-XXIX Meeting of 25 October – 5 November 2010*, ‘Report of the Twenty-Ninth Meeting of the Commission’ (Hobart, Australia, adopted 5 November 2010) [8.19].

<sup>626</sup> *Ibid* [14.13]; *CCAMLR-XXXI Meeting of 23 October – 1 November 2012*, ‘Report of the Thirty-First Meeting of the Commission’ (Hobart, Australia, adopted 1 November 2012) [9.9]; *CCAMLR-XXXIII Meeting of 20 – 31 October 2014*, ‘Report of the Thirty-Third Meeting of the Commission’ (Hobart, Australia, adopted 31 October 2014) [9.14]; *CCAMLR-XXXIV Meeting of 19-30 October 2015*, ‘Report of the Thirty-Fourth Meeting of the Commission’ (Hobart, Australia, adopted 30 October 2015) [10.6]; *CCAMLR-XXXVI Meeting of 16-27 October 2017*, ‘Report of the Thirty-Sixth Meeting of the Commission’ (Hobart, Australia, adopted 27 October 2017) [10.6].

<sup>627</sup> *CCAMLR-XXVIII Meeting of 26 October – 6 November 2009*, ‘Report of the Twenty-Eight Meeting of the Commission’ (Hobart, Australia, adopted 6 November 2009) [15.14].

<sup>628</sup> *Ibid*.

Convention in noting that fisheries allocation and regulation is part of the work of the Commission.<sup>629</sup>

COLTO has engaged in limited document submission. It submitted four papers independently,<sup>630</sup> and four in collaboration with ASOC.<sup>631</sup> All related to IUU fishing through data contributions, recommendations and general information on IUU fishing responses.

The first paper, the *Rogues Gallery* elicited the strongest member state reactions recorded in the CCAMLR Meeting Reports because it identified several member state-flagged vessels as IUU vessels. The submission of the *Rogues Gallery* in 2003 by COLTO in its first year of attendance highlighted member state complicity in IUU fishing and the lack of domestic regulation on the part of several member states.<sup>632</sup> The *Rogues Gallery* illustrates that the approval or disapproval of states is not in itself an adequate measure of the value of NGO behaviours.

The material in the *Rogues Gallery* was supportive of effective conservation and use in the Commission. There is clear support of the work of the Commission in identifying IUU vessels known to be fishing within the Convention Area. While the *Rogues Gallery* was not supportive of member states in breach of their own obligations under the

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<sup>629</sup> Australia, *Commentary on the Draft Convention on the Conservation of Antarctic Marine Living Resources*, Antarctic Treaty Ninth Consultative Meeting, Provisional Agenda Item 6 (London, 19 September 1977) ANT/IX/21; United States, *Draft Recommendation on Antarctic Marine Living Resources submitted by the United States*, Antarctic Treaty Ninth Consultative Meeting, Agenda Item 6 (London, 23 September 1977) ANT/IX/43; Working Group, *Draft Report of the Working Group on Marine Living Resources*, Antarctic Treaty Ninth Consultative Meeting, Agenda Item 6 (London, 7 October 1977) ANT/IX/82 Rev 1.

<sup>630</sup> COLTO, *COLTO background information* CCAMLR-XXVI/BG/29 (2007); COLTO, *Commercial fishing in the Ross Sea* CCAMLR-XXXI/BG/35 (2012); COLTO, *COLTO report on toothfish fisheries 2012/13* SC-CAMLR-XXXII/BG/09 (2013); COLTO, *Estimates of IUU toothfish catches in 2014/15 season* CCAMLR-XXXIV/BG/12 (2015).

<sup>631</sup> ASOC and COLTO, *Working together to end illegal, unreported and unregulated fishing in the Southern Ocean* CCAMLR-XXXIII/BG/23 (2014); ASOC and COLTO, *Collaborating to eliminate IUU fishing in the Southern Ocean* CCAMLR-XXXIV/BG/23 (2015); ASOC and COLTO, *Collaborating to eliminate IUU fishing in the Southern Ocean* CCAMLR-XXXV/BG/27 (2016); ASOC and COLTO, *Collaborating to support effective protection of Southern Ocean ecosystems* CCAMLR-XXXVI/BG/29 (2017).

<sup>632</sup> COLTO, *Rogues' Gallery*, above n 616.

*CAMLR Convention*, the obligation of NGOs under the non-state actor provisions attach to the Commission rather than to individual member states. By supporting the purposes of the Commission above the individual behaviours of member states, COLTO acted in clear pursuit of the object and purpose principles of the Convention.

Other COLTO background documents indicate strong intersessional engagement supporting data sharing for CAMLR Commission decision-making. In 2013, COLTO provided information to the Scientific Committee on the tonnage of IUU toothfish catch. This information was gathered by and from members to determine the rate of IUU catch of toothfish.<sup>633</sup> This content adheres to both the Article XXIII role for NGOs, and to the object and purpose principles through pursuit of rational use. Significantly, in their 2015 estimates of IUU toothfish catches, COLTO highlights that they are the sole providers of estimates of IUU fishing catch from the Convention Area.<sup>634</sup> This is clearly adherent to the Article XXIII role as it is supportive of the Commission. It is also supportive of the object and purpose principles as it informs conservation *including* rational use, as without sufficient data ‘rational use’ cannot be a clearly articulated part of conservation.

Aside from meeting contributions, COLTO also engaged in intersessional work. In its various statements and document submissions, COLTO alluded to their intersessional work to combat IUU fishing, both in prevention of catches being taken, and in documenting any catches being landed in port.<sup>635</sup>

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<sup>633</sup> COLTO, *COLTO report on toothfish fisheries 2012/13* SC-CAMLR-XXXII/BG/09 (2013) 2.

<sup>634</sup> COLTO, *Estimates of IUU toothfish catches in 2014/15 season* CCAMLR-XXXIV/BG/12 (2015).

<sup>635</sup> COLTO, *COLTO background information* CCAMLR-XXVI/BG/29 (2007); COLTO, *Commercial fishing in the Ross Sea* CCAMLR-XXXI/BG/35 (2012); COLTO, *COLTO report on toothfish fisheries 2012/13* SC-CAMLR-XXXII/BG/09 (2013); COLTO, *Estimates of IUU toothfish catches in 2014/15 season* CCAMLR-XXXIV/BG/12 (2015); ASOC and COLTO, *Working together to end illegal, unreported and unregulated fishing in the Southern Ocean* CCAMLR-XXXIII/BG/23 (2014); ASOC and COLTO, *Collaborating to eliminate IUU fishing in the Southern Ocean* CCAMLR-XXXIV/BG/23 (2015); ASOC and COLTO, *Collaborating to eliminate IUU fishing in the Southern Ocean* CCAMLR-XXXV/BG/27 (2016); ASOC and COLTO, *Collaborating to support effective protection of Southern Ocean ecosystems* CCAMLR-XXXVI/BG/29 (2017).

There are some enforcement activities attributable to COLTO.<sup>636</sup> COLTO acted in concert with Sea Shepherd on one occasion to delay the *Thunder*<sup>637</sup> but pursued other less obvious means of preventing IUU fishing through legitimate business contacts. From the early 1990s, Austral Fisheries, long represented by COLTO, used numerous means to find out about 'toothfish pirates, including hiring former elite soldiers and offering \$100,000 reward for information on IUU fishing in the Convention Area.<sup>638</sup> In 2003, COLTO adopted the same tactic and reward for information about the fleet of vessels including the *Thunder* that were illegally fishing in the Convention Area.<sup>639</sup>

COLTO has consistently sought to cooperate and assist the CAMLR Commission. It has demonstrated support of the object and purpose during meeting times and in the intersessional period. Within the intersessional period, COLTO undertook joint international scientific programs on aspects of Commission work such as reducing whale depredation in toothfish fisheries, eliminating seabird interactions with longlines, and other collaborative research.<sup>640</sup> COLTO also managed real-time responses and innovations to combat IUU fishing.<sup>641</sup>

This intersessional conduct of COLTO adheres to the expectations on non-state actors contained in Article XXIII of the Convention and subordinates itself to the interpretation of the object and purpose performed by the Commission in carrying out its work. This makes the ongoing behaviour of COLTO object and purpose supportive, as both intersessional and meeting roles support the work of the Commission as a whole, avoiding factional or divisive support for individual member states.

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<sup>636</sup> Eksil Engdal, and Kjetil Sæter (Diane Oatley (transl.)), *Catching Thunder* (Scribe Publications, 2018) 26.

<sup>637</sup> *Ibid.* 25.

<sup>638</sup> *Ibid.*

<sup>639</sup> *Ibid.* 42.

<sup>640</sup> Email from Mr Martin Exel, General Manager Environment and Policy, to Lucy Smejkal, PhD candidate at the University of Tasmania, 31<sup>st</sup> July 2018.

<sup>641</sup> *Ibid.*

#### 6.4.4 Sea Shepherd

Outside of Commission meetings, Sea Shepherd has sought to ‘enforce’ international law to prevent IUU fishing. The Sea Shepherd Operation Icefish in the 2014/2015 Austral summer, with the *Bob Barker* was primarily in pursuit of the *MV Thunder*, although it also encountered the *Kunlun*. Operation Icefish had some legitimacy due to the blacklisting of the vessels *Thunder*, *Viking*, *Kunlun*, *Yongding*, *Songhua* and *Perlon* by the CAMLR Commission,<sup>642</sup> as well as the listing of the *Thunder* on the Interpol wanted list. The equivocal behaviour of Australian and New Zealand authorities to Sea Shepherd and its pursuit of the *Thunder* also supported the position of Sea Shepherd as ‘enforcers’ of international law – no one else was willing to take a stand.<sup>643</sup> The Commission, through the Secretariat’s daily communications with Sea Shepherd during its pursuit of the *Viking* also provided a level of credibility that was never attained by Sea Shepherd’s scientific whaling operations.<sup>644</sup> Sea Shepherd not only communicated the location of the *Thunder*, but it also reported on illegal longlines and gillnets found in, and hauled from Convention Area waters.<sup>645</sup>

Sea Shepherd aimed to prevent IUU fishing by the *Thunder*. In doing so, it sought to uphold the conservation of the Antarctic marine ecosystem and marine living resources. This demonstrated fundamental adherence to the principles of the *CAMLR Convention* as it prioritized conservation and contributed to the capacity for the Commission to engage in rational use. The communication of the *Thunder*’s location and the reporting and hauling of illegal fishing gear similarly contributed to the Commission’s capacity to make decisions on the best data possible, as well as contributing to the capacity to engage in rational use.

Despite having never received accreditation as an observer from the Commission, Sea Shepherd’s engagement with the Secretariat indicates at least some knowledge and acceptance from the Commission of the Sea Shepherd’s actions in the Southern Ocean

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<sup>642</sup> Engdal and Sæter above n 636, 10.

<sup>643</sup> Engdal and Sæter above n 636, 29, 46, 47, 65, 71-72, 86.

<sup>644</sup> Interview with Interviewee 6 (15 September 2014).

<sup>645</sup> Engdal and Sæter above n 636, 93; Interview with Interviewee 6 (15 September 2014).



on the part of the Commission or some of its members.<sup>646</sup> Despite its non-status, Sea Shepherd has demonstrated adherence to Article XXIII. Although it has not been ‘sought’ by the Commission or Scientific Committee as required by Article XXIII, Sea Shepherd has acted co-operatively to contribute to the work of the Commission by enforcing conservation measures of the Commission and contributing information for decision-making purposes. If their contributions had been sought, Sea Shepherd would have been compliant with object and purpose as well as NGO roles.

## 6.5 Object and purpose analysis of NGO enforcement and regulation roles in the Whaling Commission

To further the object and purpose of the *Whaling Convention*, NGO engagement on scientific whaling should address:

1. the fundamental relationship between the principles of the **object and purpose and scientific data**;
2. that **conservation** is a mechanism for **supporting** the development and rehabilitation of whale stocks;
3. that conservation is use-oriented for the purposes of supporting and/or **re-establishing the whaling industry**.

Several aspects of the object and purpose principles need to be highlighted in observer NGO behaviour around Article VIII scientific whaling. Firstly, the conduct itself needs to stay within the bounds of meeting propriety under the *Whaling Commission Rules of Procedure, Rules of Debate* and the *Code of Conduct*. Secondly, engagement must address the function of scientific whaling in terms of conservation and rehabilitation of whale stocks. The opposition to, or support of, scientific whaling needed to show that the basis for the position was intrinsically connected to a concern for the conservation and use of whale stocks. This would be with a view to sustainable intergenerational access to whales as a food source.

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<sup>646</sup> Interview with Interviewee 6 (15 September 2014).

### 6.5.1 Hybrid NGOs: the IUCN and IWMC WCT

The IUCN is the sole hybrid NGO present in both the Whaling Commission and the CAMLR Commission. This makes it a valuable comparator for behavioural consistency across Commissions. While there were limited contributions of the IUCN those contained careful consideration of the nature of scientific whaling with reference to the *Whaling Convention*. The IWMC WCT addressed issues on scientific permit whaling with less frequency, primarily focusing on highlighting the legitimacy of scientific whaling.

#### *Opening Statements*

In Opening Statements, the IUCN was the first NGO to oppose scientific whaling. The opposition was made in light of the spirit of the *Whaling Convention*. Its early Opening Statements opposed the validity of special permits and contested the value of lethal scientific whaling to the data record.

In 1977, the IUCN argued that the Government of Japan setting a quota of 240 Brydes whales was ‘contrary to the spirit of the new management policy’.<sup>647</sup> The IUCN employed firmer words in 1986, stating that scientific whaling ‘as proposed to be carried out by some nations represents a serious abuse of the spirit of the IWC, if not the letter of the law.’<sup>648</sup> The critical position of the IUCN continued in a similar vein in 1988, along with advocacy for non-lethal research.<sup>649</sup> In 1995, the IUCN suggested that the Scientific Committee should have a greater role in determining the utility of scientific whaling.<sup>650</sup> From this point in time the activities of the IUCN on scientific whaling seem to have turned toward work within its own organization. This perspective is evidenced by IUCN Opening Statements no longer mentioning scientific whaling, and reference from environmental NGOs to IUCN Congress Motions, made after 1995, on scientific whaling.<sup>651</sup>

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<sup>647</sup> Twenty-ninth meeting of the IWC, *Verbatim Records: Monday 20<sup>th</sup> June 1977* Resource ID 417, 41.

<sup>648</sup> IUCN, *IUCN Statement to the IWC* IWC/38/OS IUCN (1986).

<sup>649</sup> IUCN, *Statement to the International Whaling Commission* IWC/40/OS IUCN (1988).

<sup>650</sup> IUCN, *Opening Statement to the 47<sup>th</sup> Meeting of the IWC* IWC/47/OS IUCN (1995).

<sup>651</sup> Animal Welfare Institute, *Joint Statement of the Animal Welfare Institute, OceanCare and Pro Wildlife* IWC/66/OS AWI, OC & PW (2016); IUCN General Assembly, *Large and*

The position of the IUCN demonstrated concern for stock rehabilitation and whale conservation principles in the object and purpose. The IUCN's early arguments relate to the principles underlying the *Whaling Convention*, challenging how well special permits adhere to the spirit of the Convention. Arguably, the ICJ *Whaling* decision supports this position as the court determined that the JARPA II program did not constitute whaling for scientific purposes, and so failed to address object and purpose criteria.

The IUCN was compliant with Article IV roles for NGOs and supports the object and purpose principles of the *Whaling Convention*. Scientific purposes must be for the rehabilitation and conservation of whale stocks. The IUCN position was clearly compliant both in terms of its content and its role within Article IV, as the IUCN commentary directed the Commission to consider the value of scientific data obtained through special permit whaling in terms of the 'spirit' or object and purpose of the Convention.

The position of the IWMC WCT was less prominent in Opening Statements, making only the one statement in 2004 drawing comparisons between the anti-whaling environmental NGO position that scientific whaling was only possible because of 'loopholes'; instead arguing that NGO influence was just such a loophole, influencing the Commission to move beyond its remit.<sup>652</sup>

#### 6.5.2 Environmental NGOs

A wide variety of NGOs in the environmental NGO category were selected for several reasons. Firstly, Opening Statements were considered in terms of comparability with the CAMLR Commission, so NGOs that were members of ASOC were included, such as Greenpeace and WWF. NGOs were also selected because of the relevance of their statements to scientific whaling and understanding or interpretation of the *Whaling*

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*small cetaceans* Res/15/19/1981 (Christchurch, New Zealand); IUCN General Assembly, *Whaling* Rec/17.46/1988 (San José, Costa Rica); IUCN General Assembly, *Cetacean conservation and the International Whaling Commission moratorium* Rec/18.34/1990 (Perth, Australia); IUCN General Assembly, *Protection of small cetaceans* Rec/18.35/1990 (Perth, Australia); IUCN General Assembly, *Commercial Whaling* Rec/19.63/1990 (Buenos Aires, Brazil); IUCN General Assembly, *Southern Ocean Whale Sanctuary* Rec/19.64/1994 (Buenos Aires, Brazil); IUCN General Assembly, *Motion 058: Concerns about whaling under special permits* WCC-2016-Res-055 (Honolulu, Hawai'i).

<sup>652</sup> IWMC, *IWC: A System of Loopholes* IWC/56/OS IWMC (2004).

*Convention.* Another consideration was the prominence of the NGO across the lifetime of the scientific whaling agenda item. The final influencing factor was jurisdictional, NGOs were selected to provide broad representativeness of environmental NGOs across the membership of the Whaling Commission. This includes environmental NGOs from Japan and several Latin American member states.

### *Opening Statements*

Over twenty environmental NGOs submitted Opening Statements addressing scientific whaling. Prominent among these were the anti-whaling environmental NGOs, Animal Welfare Institute (AWI), Humane Society International (HSI),<sup>653</sup> World Wide Fund for Nature (WWF), Greenpeace, ASOC, Pew Environment Group (PEW), and the International Fund for Animal Welfare (IFAW). Some commentary was provided on the special permit whaling issue by two pro-whaling environmental NGOs, namely Global Guardian Trust (GGT). There were other, smaller NGOs that also submitted Opening Statements.

Most Opening Statements objecting to special permit whaling adhered to an argument that relied on the principles of conservation and rehabilitation in the object and purpose. Statements from anti-whaling environmental NGOs argued that scientific whaling circumvented the moratorium's purpose of addressing the decline of whale stocks and supplementing the inadequate conservation measures that had previously been implemented to halt that decline. For example, WWF statements from 2005-2009<sup>654</sup> advocated for inclusion of special permit whaling in the Revised Management Scheme (RMS), thus bringing scientific whaling within the regulatory framework for the resumption of whaling. The strength of the WWF position on bringing scientific whaling permits into the management procedures of the Commission was that it attempted to

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<sup>653</sup> The Humane Society International (HSI) also acted in the Federal Court of Australia seeking to use Australia's claims to an EEZ in Antarctica to prevent Kyodo Senpashu, the company running the whaling voyages for the IRC, from continuing to whale in Australia's declared whale sanctuary: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425.

<sup>654</sup> WWF, *WWF Opening Statement IWC/57/OS WWF* (2005); WWF, *Opening Statement: 58<sup>th</sup> meeting of the IWC IWC/58/OS WWF* (2006); WWF, *WWF Opening Statement to the 59<sup>th</sup> meeting of the IWC IWC/59/OS WWF* (2007); WWF, *WWF Opening Statement IWC/60/OS WWF* (2008); WWF, *WWF Opening Statement IWC/61/OS WWF* (2009).

subordinate Article VIII whaling to the principles of the Convention. This is compliant with the object and purpose principles as it places these principles as the primary reference point for evaluation of any activity undertaken in relation to the *Whaling Convention*. The position of WWF was supported by other anti-whaling environmental NGOs, which also argued against scientific whaling as a legitimate means of obtaining useful data on whales, whale stocks, and stock rehabilitation; proposing that non-lethal research was far more consistent with the purposes of the Convention.<sup>655</sup>

A number of anti-whaling environmental NGOs acted to promote benign whaling research schemes, including Elsa Nature Conservancy, a Japanese environmental NGO.<sup>656</sup> But other anti-whaling environmental NGOs simply promoted their organization policy of a critical stance on scientific whaling without reference to any function that could fall within Article IV NGO participation or the object and purpose.<sup>657</sup>

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<sup>655</sup> WWF, *WWF Statement to the 37<sup>th</sup> Annual Meeting of the IWC* IWC/37/OS/WWF (1985); ISAP, *Opening Statement to the 37<sup>th</sup> Annual IWC Meeting of the Institute for Study of Animal Problems (ISAP)* IWC/37/OS ISAP (1985); CSI formerly CCS, *Opening Statement by Cetacean Society International (formerly CCS)* IWC/38/OS CSI (1986); CSI, *Opening Statement by Cetacean Society International* IWC/40/OS CSI (1988); IUCN, *Statement to the International Whaling Commission* IWC/40/OS IUCN (1988); ELSA Nature Conservancy, *Open Statement to the 41<sup>st</sup> Annual Meeting of International Whaling Commission* IWC/41/OS ELSA (1989); IUCN, *Statement of IUCN – The World Conservation Union to the 43<sup>rd</sup> Annual Meeting of the IWC* IWC/43/OS IUCN (1991); National Committee for the Defence of the Flora and Fauna, *Opening Statement by CODEFF* IWC/47/OS CODEFF (1995); Dominica Conservation Association, *Submission to the 47<sup>th</sup> Meeting of the IWC* IWC/47/OS DCA (1995); IFAW, *Opening Statement to the 47<sup>th</sup> Annual meeting of the IWC* IWC/47/OS IFAW (1995); The Cousteau Society, *Statement of the Cousteau Society/Equipe Cousteau to the 48<sup>th</sup> Annual Meeting of the IWC* June 24-28, 1996 IWC/48/OS Coust. Soc. (1996); ACS, *American Cetacean Society Opening Statement* IWC/55/OS ACS (2003); FWSI, *Opening Statement of the Finns for the Whales Society* IWC/55/OS FWSI (2003); ACS, *American Cetacean Society Opening Statement* IWC/61/OS ACS (2009); CSI, *Cetacean Society International Opening Statement* IWC/61/OS CSI (2009); WWF, *WWF Opening Statement* IWC/61/OS WWF (2009); WWF, *WWF IWC66 Opening Statement* IWC/66/OS WWF (2016).

<sup>656</sup> ELSA Nature Conservancy, *Open Statement to the 41<sup>st</sup> Annual Meeting of International Whaling Commission* IWC/41/OS ELSA (1989); Ocean Defense International, *Opening Statement* IWC/53/OS ODI (2001); FWSI, *Opening Statement of the Finns for the Whales Society* IWC/55/OS FWSI (2003); Dolphin and Whale Conservation Network, *Opening Statement* IWC/57/OS (2005).

<sup>657</sup> CSI, *Opening Statement to the 46<sup>th</sup> meeting of the IWC* IWC/46/OS CSI (1994); IFAW, *'Actions for Protection of Whales in Puerto Vallarta and Beyond': Opening Statement by the International Fund for Animal Welfare (IFAW)* IWC/46/OS IFAW (1994); APAWC,

This lack of engagement with the *Whaling Convention* was not restricted to anti-whaling environmental NGOs. The pro-whaling environmental NGOs and unions also failed to engage with either Article IV or the object and purpose, making broad statements of support without any critical or collaborative input.<sup>658</sup>

The strength and value of positions that made clear, practical contributions brought within the parameters of the object and purpose were ultimately supported by the ICJ decision that there needed to be a clear connection between the lethal whaling and scientific programs that addressed the object and purpose principles of the *Whaling Convention*. However, numerous Opening Statements did not meet the criteria of either Article IV positions for non-state actors, or the terms of the object and purpose principles because they were simply espousals of an organizational position that did not contribute to the implementation of the *Whaling Convention* as a matter of the rule of international law.

#### *Protest at the 2014 and 2016 meetings*

This part considers the nature of object and purpose principle support among protester placards at the 2014 and 2016 Whaling Commission meetings. During the 2014 and 2016 Commission meetings at the Grand Hotel Bernardin in Portorož, Slovenia a designated space was provided by the Secretariat outside the venue for protesters and demonstrators for the duration of the two weeks of sub-committee and Commission meetings. This space was located across the road from the front entrance of the Grand Hotel. Temporary fencing marked out the area. Inside the hotel, security stations with electronic card readers in the meeting area prevented anyone except delegates, observers, and staff from entering the meeting areas. Security staff were also located at

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*Association for the Protection of Amazonia and Wildlife – Caribbean Opening Statement IWC/47/OS APAWC (1995); National Committee for the Defence of the Flora and Fauna, Opening Statement by CODEFF IWC/47/OS CODEFF (1995); American Cetacean Society, American Cetacean Society Opening Statement IWC/53/OS ACS (2001); IFAW, Opening Statement 55<sup>th</sup> Meeting of the IWC IWC/55/OS IFAW (2003); Animal Welfare Institute, AWI Opening Statement IWC/57/OS AWI (2005); Cousteau Society, Opening Statement to the 57<sup>th</sup> meeting of the IWC IWC/57/OS CS (2005); Greenpeace, Opening Statement to the 57<sup>th</sup> meeting of the IWC IWC/57/OS (2005).*

<sup>658</sup> JSWA, *Japan Small-Type Whaling Association IWC/45/OS JSWA (1993); IFCNR, Opening Statement IWC/52/OS IFCNR (2000); All Japan Seamen's Union, Opening Statement to the 58<sup>th</sup> Meeting of the IWC IWC/58/OS JSU (2006).*



the entrances to the hotel to prevent any but hotel guests and meeting attendees from entering the lobby or other areas.

In 2014, there were numerous banners displayed on the temporary fencing of the protest area, facing the hotel. Sea Shepherd was present for the duration of the Commission meetings. The contents of the banners consistently condemned whaling in all forms, and many were directed toward condemning scientific whaling.



*Image 6.1 Protest banners at the 2014 Whaling Commission meeting. Portorož, Slovenia.*  
Source: © the author

The text of the banners includes 'Whaling? Don't buy it!'; this may refer to the vote buying scandal in the Commission.<sup>659</sup> There was a Sea Shepherd banner with a logo and next to it 'Japan. Who are you fooling? You must abide by the ICJ ruling.' On the right of this is a banner from 'Surfers for Cetaceans'. Next to that a banner with graphic pictures of dead whales and dolphins with the message 'end dolphin & whale slaughter'. Other banners include 'respect existence or expect resistance', and two others promote whale watching, one with a crossed out 'c' in 'whale catching' replaced with a 'w'. Another, not entirely visible in the picture protests the 'murder' of a pregnant whale.

Protesters did not agree to the terms of the *Whaling Convention* in any form as they are not observers, and they do not operate within the sphere of *Rules* set down by the Commission. However, it is important to evaluate the extent to which the banners and positions interact with the object and purpose. Ultimately, it can't be expected that protesters will adhere to the object and purpose principles of the *Whaling Convention*. However, in applying the object and purpose analysis it is clear that protester

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<sup>659</sup> Gillespie, above n 263, 428-440.

representations fall outside the scope of the rule of law represented by the Convention. Perhaps the issue is that protesters affirm ‘a legal right of resistance where none but a moral right could be pretended’.<sup>660</sup>

Firstly, the ‘Japan. Who are you fooling?’ misrepresents the nature of the ICJ decision and the intentions of Japan regarding future development of scientific whaling programs. Japan has abided by the ICJ decision and at the time of the 2014 meeting had ended its JARPA-II program. It had announced intentions to develop a new scientific whaling program that would satisfy the criteria set out by the ICJ that the program of whaling must ‘be for scientific purposes.’

The extent to which protesters engaged with the object and purpose can only be described as incidental. There are no deliberate attempts to refer to the rule of law – except where it intersects with their politics. There is an intense focus on conservation, reinterpreting the *Whaling Convention* for the purposes of a whale watching industry rather than whaling, and an anthropomorphizing of whales by using the word ‘murder’. This trend was also picked up within the Commission meeting by at least one NGO.<sup>661</sup>

Protest banner text addressing the object and purpose is absent. However, some banners have a tone of reinterpretation of the object and purpose ‘whale watching not whale catching’. There is also accusatory language and goading of Japan and its interests in the Whaling Commission – ‘whaling. Don’t buy it’ and ‘Who are you fooling. You must abide by the ICJ decision’. This position on Japanese membership practices, alludes to vote buying, the “loophole” argument on scientific whaling, and derision about the development of the JARPN and NEWREP-A scientific whaling programs. These positions were mirrored in the meeting spaces among accredited observers.<sup>662</sup> These behaviours

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<sup>660</sup> Brown, above n 567.

<sup>661</sup> Instituto de Conservación de Ballenas, *Opening Statement IWC/66/OS ICB* (2016) ‘whaleity’ being legal recognition of the whale personality.

<sup>662</sup> WWF, *Opening Statement IWC/65/OS WWF* (2014); IWC 66<sup>th</sup> *Annual Meeting of October 2016*, ‘Annual Report of the International Whaling Commission 2016 – covering the October 2014 – October 2016 financial year’ (Portorož, Slovenia, adopted October 2016) 12-13, 20; WSPA et al, *NGO Statement on the Welfare of Whales Subject to Commercial Whaling* (2007) [https://www.hsi.org.au/editor/assets/Welfare\\_pos\\_state\\_IWC59.pdf](https://www.hsi.org.au/editor/assets/Welfare_pos_state_IWC59.pdf); *First Santiago Declaration by the Latin American Non Government Organizations for Whale*



bypass consideration of the object and purpose in favour of political arguments that bear little relation to the *Whaling Convention*.



*Image 6.2 Protest banner at the 2016 Whaling Commission Meeting. Portorož, Slovenia. Source: Paul Spong/orcalab.org*

The 2016 protest signs were also not connected to the object and purpose of the *Whaling Convention*. There was significant repetition from the 2014 meeting, with whale watching signs promoting a re-interpretation of the Convention at both meetings, and various anti-whaling banners. New banners were introduced in 2016 including 'It's time to take whale meat off the menu', 'Tradition? Sustainable? There is no excuse for animal abuse' and:

*Japan's NEW REP-A is their NEW RAPE of the Sth Ocean Whale Sanctuary with the MURDER of many thousands of MOTHERS PREGNANT MOTHERS and their UNBORN CHILDREN*

This banner clearly sets aside the possibility of there being lethal scientific research that meets the object and purpose principles and the scrutiny of the Scientific Committee. It objects on moral grounds. The moral grounds are an appeal to the sentience of cetaceans as large mammals with the use of the word 'murder' and by referring to

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*Conservation* (Santiago de Chile, October 18 2007); Vassili Papstavrou and Patrick Ramage, 'Commercial Whaling by Another Name. The Illegality of Japan's Scientific Whaling: Response to Dan Goodman' (2010) 13(2) *Journal of International Wildlife Law & Policy* 183 – both authors represent IFAW at Whaling Commission meetings; IFAW, 'Second Sydney Panel of Independent Experts – the conformity with international law of Japan's proposed research plan for scientific whaling in the Antarctic Ocean ("NEWREP-A")' (November 2015, Second Sydney Panel of Independent Experts, Sydney) *Summary of Findings*.

pregnant whales as ‘mothers’, and their calves as ‘children’. This falls outside the scope of the object and purpose of the Convention.

#### 6.5.3 Sea Shepherd, 2005 – 2014

From 2005–2014 Sea Shepherd engaged in preventative enforcement of an idiosyncratic interpretation of the *Whaling Convention* and international law in the Southern Ocean. While Sea Shepherd refers to a number of international legal documents as authority to enforce law on the high seas, its primary argument is that they have legal authority for all campaigns in Articles 21–24 of the *United Nations World Charter for Nature (World Charter for Nature)*.<sup>663</sup> Specifically, Sea Shepherd states that their authority derives from Article 21(e) of the *World Charter for Nature*, which reads

*States, and to the extent they are able, other public authorities, international organizations, individuals, groups, and corporations shall: safeguard and conserve nature in areas beyond national jurisdiction.*

This is a broad remit, and one which, as interpreted by Sea Shepherd, reverses the tenet *lex specialis derogat legi generali*,<sup>664</sup> (the specific overrides the general) and instead posits that the general law applies in specifically governed situations, displacing the mechanisms of the Whaling Commission in the process. Sea Shepherd founder, Paul Watson described the position of Sea Shepherd as being concerned with the laws of nature rather than of man.<sup>665</sup> Similarly, Watson has argued elsewhere that the laws of nature must prevail over the laws of man.<sup>666</sup>

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<sup>663</sup> Sea Shepherd Conservation Society, *International Laws and Charters* (2018) Sea Shepherd Australia <https://www.seashepherd.org.au/who-we-are/about-us/laws-and-charters.html>.

<sup>664</sup> International Law Commission, *Report of the International Law Commission* GAOR 66<sup>th</sup> session, supp no. 10 UN Doc A/66/10/Add.1 (26 April – 3 June and 4 July – 12 August 2011) 39 and 135; International Law Commission, *Draft articles on the responsibility of international organizations* UN Doc A/CN.4/L.778 (3 June 2011) Article 64: *Lex specialis*.

<sup>665</sup> Engdal and Sæter, above n 636, 22.

<sup>666</sup> Watson, above n 569.

The *World Charter for Nature*, which is a key document relied upon by Sea Shepherd in claims of jurisdiction, is a General Assembly Resolution.<sup>667</sup> If it could be relied upon as authority to override the jurisdiction of a whaling-specific convention and Commission, the complex relationship between General Assembly Resolutions, treaty bodies, and customary international law would be reduced to a simple reversal of the *lex specialis* interpretative rule.<sup>668</sup> So, Sea Shepherd's ideological rejection of the Whaling Commission's regulation fundamentally undermines the *Whaling Convention* object and purpose.

There is some literature on the question of the legal authority of Sea Shepherd to act as it did against Japanese scientific whaling vessels.<sup>669</sup> The compliance of Sea Shepherd with the terms of the *Whaling Convention* was not covered in this literature. This thesis contributes a consideration of how Sea Shepherd reflects Article IV expectations and how Sea Shepherd conduct engages with object and purpose principles of the *Whaling Convention*.

As discussed, Article IV makes room for non-state actors to be delegated the role of administrators, supporters and proponents of scientific research on cetacean stocks and their conditions. The Commission is the delegator of such roles. The opposition to Article VIII special permits may fall within Article IV where there is some express or

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<sup>667</sup> *World Charter for Nature*, GA Res A/RES/37/7 UN GAOR Plenary, 48<sup>th</sup> sess, 28 October 1982, Un Doc A/37/PV.48.

<sup>668</sup> Jacob E Gersen & Eric A Posner, 'Soft Law: Lessons from Congressional Practice' (2008) 61 *Stanford Law Review* 573, 575; Michael P Scharf, 'Accelerated Formation of Customary International Law' (2014) 20(2) *ILSA Journal of International & Comparative Law*, 305, 324-328; Stephen M Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law (1979) 73 *Proceedings of the Annual Meeting (American Society of International Law)* 301, 302; Oscar M Garibaldi, 'The Legal Status of General Assembly Resolutions: Some Conceptual Observations' (1979) 73 *Proceedings of the Annual Meeting (American Society of International Law)* 324, 326-327.

<sup>669</sup> Blay and Bubna-Litic, above n 384, 466 calling Sea Shepherd direct action a 'self-help remedy' in relation to an Australian Federal Court decision; Avi Brisman, 'Crime-Environment Relationships and Environmental Justice' (2007-2008) 6 *Seattle Journal of Social Justice* 727, 755 calling direct action 'coercive conservation'; Nagtzaam and Lentini, above n 384; Anton, above n 383, 138 rejecting the *World Charter for Nature* as grounds for Sea Shepherd enforcement capacities, 45 rejects any legal basis arising; Roeschke, 'above n 383, 135 makes untenable, foundation-less claims for Sea Shepherd possessing 'relevant legal authority'.

implied acceptance of the actions of an NGO by the Commission. The Whaling Commission unanimously condemned the safety at sea issues of Sea Shepherd actions against the JARPA II vessels. But, it wasn't until 2011, after two resolutions<sup>670</sup> and one intersessional statement,<sup>671</sup> that the Commission as a whole was willing to call upon Sea Shepherd to desist in its attacks on the JARPA vessels.<sup>672</sup> This indicated the division that exists in the Commission on the matter of scientific whaling.

Some member states demonstrated tolerance of Sea Shepherd activities. For example, there was unspoken support for Sea Shepherd from the Australian government. Sea Shepherd registered their vessels' port states as Australia and the Netherlands at various times,<sup>673</sup> and the port of departure for all Sea Shepherd campaigns into the Southern Ocean against JARPA II vessels was Hobart, Tasmania, Australia. This was not indicative of a broader stance.

The question of object and purpose compliance for Sea Shepherd two-sided. Formal compliance with Article IV of the *Whaling Convention* is non-existent. Sea Shepherd was rejected twice by the Commission in its application for observer status, and the impossibility of their attendance made clear.<sup>674</sup> However, in opposing scientific whaling, despite the stated intentions of the group itself, which is simply to oppose any whaling, legal or not, Sea Shepherd has demonstrated object and purpose compliance.

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<sup>670</sup> *Resolution on the Safety of Vessels Engaged in Whaling and Whale Research-Related Activities Resolution 2006-2* (IWC) IWC/58/23Rev (2006); *Resolution on Safety at Sea and Protection of the Environment Resolution 2007-2* (IWC) IWC/59/25 (2007).

<sup>671</sup> *Chair's Report of the 64<sup>th</sup> Annual Meeting of the International Whaling Commission* (2-6 July 2012 Panama City, Panama) 44.

<sup>672</sup> *IWC 63rd Meeting of July 2011, 'Annual Report of the International Whaling Commission 2011 – covering the 2010-2011 financial year'* (St Helier, Jersey, adopted July 2011) 25; *Resolution on Safety at Sea Resolution 2011-2* (IWC) IWC/63/17 (2011) in which the Commission calls upon Sea Shepherd to 'refrain from dangerous actions that jeopardise safety at sea'.

<sup>673</sup> There were indications that the Netherlands continued to allow the registration of Sea Shepherd vessels only because of difficulties in amending domestic law to prevent it: Email from Rene Lefeber, Legal Adviser and Head of the International Law Division of the Directorate of Legal Affairs of the Netherlands Ministry of Foreign Affairs to Dr Julia Jabour, Senior Lecture, Institute of Marine and Antarctic Studies, 29<sup>th</sup> January 2016.

<sup>674</sup> See letters and Annual Report references, above n 436.

The interpretation of Article VIII requires lethal research ‘for scientific purposes’ to support the orderly development of the whaling industry and conservation. Sea Shepherd’s interference in the whaling efforts of the JARPA II vessels constituted support of the conservation and future use objectives of the convention, *even if there is no organizational intention to support use*. Object and purpose analysis is an objective assessment of behaviours. The actions of Sea Shepherd itself, from 2005–2014 sought to prevent a form of the whaling that did not itself meet the terms of the *Whaling Convention*. The actions of the whalers violated the terms of the Convention,<sup>675</sup> and failed to be for scientific purposes, in light of conservation, industry development and future access to resources. In opposing that whaling, Sea Shepherd implicitly upheld the object and purpose, despite their own intentions, just as, despite its intentions, the JARPA II research program failed to satisfy the requirements of Article VIII.

## 6.6 Conclusions

This chapter has considered NGO engagement in the CAMLR Commission and Whaling Commission on catch regulation and enforcement, a fundamentally use-oriented issue of both Commissions. In relation to scientific whaling and regulation of IUU fishing, NGOs have frequently demonstrated engagement with the object and purpose principles of the respective Conventions. Observer environmental NGOs in the Whaling Commission have, at times, presented their own organizational policies, in lieu of engaging with the terms of the convention, but the majority of the content has demonstrated strong engagement with object and purpose principles. Similarly, industry and environmental NGOs in the CAMLR Commission have presented largely supportive positions in relation to the object and purpose principles, both within and outside meetings. There was no engagement on these issues by scientific NGOs.

NGO engagement on IUU fishing in the CAMLR Commission has demonstrated significant change since the first early engagement. Environmental NGO, ASOC and its member ISOFISH initially engaged with the Commission in calling for a total moratorium on toothfish catches within the Convention Area. This trajectory gradually shifted and supportive contributions were made to the measures implemented by the Commission. Industry NGO, COLTO, attended its first meeting with significant

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<sup>675</sup> *Whaling in the Antarctic* (Judgment) [2014] ICJ Reports 226, [218].

controversy generated by its paper, *Rogues Gallery*. It has maintained a steady series of contributions intended to support the work of the Commission in preventing as well as accounting for IUU fishing. Object and purpose adherence among all NGOs has been high. This is possibly due to the nature of IUU fishing, which is a negation of conservation values, and so places NGOs in a strong position to emphasise conservation. However, the clear adherence to object and purpose principles by the industry NGO, COLTO, also indicates that self-interest in rational use tends toward object and purpose adherence in the CAMLR Commission's approach to conservation and use. Sea Shepherd, in the intersessional period also engaged with clear adherence to the object and purpose principles of the *CAMLR Convention*.

The Whaling Commission experiences of NGO behaviours in relation to scientific whaling have been more diverse. The engagement of Sea Shepherd, to start, tested the objectivity of the Commission members. Seen from an object and purpose perspective, while the direct-action campaigns challenged international law on maritime safety, there was adherence to the *Whaling Convention* by virtue of the nature of Japanese scientific whaling being found to be unlawful by the ICJ. From observer NGOs, there was a broad range of Opening Statements, many of which made significant connections between the object and purpose principles and scientific whaling contributions to those principles. Others relied heavily on emotive and political urgings.

While Chapter Five demonstrated that there has been little consistency in NGO behaviours over time when measured against object and purpose principles, this chapter has found significant engagement with the core principles guiding NGOs in both Commissions.

While there is no method for determining the likelihood of NGO engagement with object and purpose principles, some themes can be identified. Firstly, in the CAMLR Commission, where there was Commission-led engagement with an issue, a majority of NGO behaviours showed engagement with object and purpose principles. This was clear in the development of the issue of IUU fishing, with NGO observer engagement generally showing supportive, cooperative engagement with the Commission to tackle the intersection of use, conservation and common future obligations. The hostile behaviours of ASOC and then, more overtly, COLTO, directed toward the Commission or Commission members engaged with the object and purpose. The Article XXIII

cooperative and supportive relationship became the dominant engagement type very quickly for both NGOs, after initial hostility was addressed by the Commission in articulating its expectations of observer NGOs.

In relation to intersessional conduct, the engagement of COLTO and Sea Shepherd to prevent IUU fishing in the Southern Ocean and stop the landing of IUU fish catches were clearly supportive of object and purpose principles and IUU fishing conservation measures put in place by the Commission. Whether there was a lawful basis for such engagement is a complicated question beyond the scope of this thesis. However, in terms of the object and purpose principles, there were clear attempts to support the work of the CAMLR Commission, which is the question that this thesis more broadly addresses.

In the Whaling Commission, there was significant variety in the content of NGO behaviours during and around Commission meetings. Some NGO approaches were directed toward emotive language and politicised the issue of scientific whaling. However, the majority of NGO behaviours focussed on the object and purpose issues of scientific whaling by highlighting the inconsistencies of the JARPA programs in relation to the object and purpose. These inconsistencies lay between the low scientific value of scientific whaling programs and how these programs contributed to conservation, industry rehabilitation, and future generations' access to whale resources. While the nature of 'industry' and 'whale resources' is a contentious issue in itself, engagement with object and purpose principles was present in many NGO behaviours. Similarly, the intersessional behaviours of Sea Shepherd reflected similar engagement to prevent low scientific value activities that were perceived to hinder furtherance of the underlying objectives of the *Whaling Convention*. These perspectives were ultimately borne out by the decision of the ICJ.

The value of considering IUU fishing and scientific whaling is that both issues have provided an opportunity to address appropriate behaviour on the parts of states and NGOs. This is particularly relevant in considering the balance between principles of use and conservation, and contributions from NGOs on how the balance is determined. The intensely emotional responses of environmentalists to whaling, and the justice-response elicited by IUU fishing highlight the need for an objective standard of assessing NGO conduct in contributing to the use-conservation balance in Commission decision-

making. Applying the object and purpose analysis to the variety of NGO conduct has demonstrated that an objective assessment of NGO behaviours can separate their conduct from the response of member states.

Following from this chapter, Chapter Seven explores the issue of protected areas. Chapter Seven looks at the conservation-oriented issue of protected areas, addressing how NGOs engage with this conservation issue, as opposed to the use-orientation of catch regulation. With the combination of these three chapters, a full picture of NGO behaviour and engagement with object and purpose principles will be presented, across the spectrum of object and purpose principles.



## Chapter 7: NGO engagement over Marine Protected Areas (MPAs) and Whale Sanctuaries

### 7.1 Introduction

This chapter examines how NGOs have engaged with the object and purpose principles of the *Whaling Convention* and the *CAMLR Convention* on the issue of marine protected areas (MPAs) in the CAMLR Commission and whale sanctuaries in the Whaling Commission (referred to collectively as ‘protected areas’). Protected areas are key conservation tools in marine protection, supporting a range of protective purposes including coastal integrity, species replenishment, ecosystem protection, and support of sustainable fisheries.<sup>676</sup> Protected areas have been significant and/or long-standing agenda items in both the Whaling and CAMLR Commissions, generating extensive Commission discussion and NGO engagement. The formal and informal roles undertaken by NGO observers in relation to protected areas are considered in terms of the object and purpose of each Commission’s founding document. Consistent with the broader arguments of this thesis, the chapter demonstrates that the value of NGO observer contributions should be assessed with reference to the object and purpose principles.

The discussion of NGO engagement over MPAs in the CAMLR Commission focuses on the period from 2005 – 2016. The central discussion is around the formal and informal engagement mechanisms of accredited observers. In the Whaling Commission, the focus on protected areas is on the South Atlantic Whale Sanctuary, from 2010 – 2016, examining both formal engagement and informal engagement through Commission meetings. Formal engagement involves Opening Statements, and in 2012 and 2014 addressing the Commission on the agenda. The informal engagement was a 2016 South

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<sup>676</sup> Ingvild Ulrikke Jakobsen, *Marine Protected Areas in International Law: An Arctic Perspective* (Brill, 2016) Part 1. Marine Protected Areas as a Tool for Conservation and Sustainable use of Marine Biological Diversity. Chapter 1. Introduction, 3-17; Kristina M Gjerde and Anna Rulska-Domino, ‘Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead’ (2012) 27 *The International Journal of Marine and Coastal Law* 351, 353-355; Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea* (Brill, 2007) 10-11.

Atlantic Sanctuary promotional meeting with associated promotional materials. There is some reference to the previous sanctuary designations – the Indian Ocean Whale Sanctuary in 1979, and the Southern Ocean Whale Sanctuary in 1994. The designation of whale sanctuaries for the conservation and development of whale species first entered the Whaling Commission agenda in 1979. The continued presence of whale sanctuaries on the Commission agenda in a majority of meeting years since that time is testament to their continuing importance.

In marine management terms, protected areas management measures should be flexible since there are various aspects of conservation, use, science, and preservation to be considered in the designation and implementation of these spaces.<sup>677</sup> Protected areas are intended for long-term conservation and preservation, based on scientifically determined values, with varied levels of protection from exploitation activities. The management of protected areas should also reflect diverse objectives through the specific terms of the measures regulating use of the area.<sup>678</sup> These diverse objectives can be reflected in protected areas being multiple use areas, time-limited or activity-limited, while permitting some commercial or scientific activities.

International organizations and state governments have placed protected areas high on their environmental agendas.<sup>679</sup> Emphasizing the significance of protected areas to

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<sup>677</sup> Graeme Kelleher (ed), *Guidelines for Marine Protected Areas* (World Commission on Protected Areas of IUCN, Best Practice Protected Area Guidelines Series No. 3, 1999) 37-41; see also *Antarctic Treaty System* guidelines for the designation of protected and managed areas: *The Protocol on Environmental Protection to the Antarctic Treaty. Area Protection and Management* 1998 ATS 6 (entered into force 24 May 2002) Annex V, Articles 3 and 4.

<sup>678</sup> Kelleher, above n 677; Elizabeth A Fulton et al., 'Modelling marine protected areas: insights and hurdles' (2015) 370 *Philosophical Transactions Royal Society of London B Biological Sciences* 1681; Venetia Alexa Hargreaves-Allen, Susana Mourato and Eleanor Jane Milner-Gulland, 'Drivers of coral reef marine protected area performance' (2017) 12(6) *PLoS One*.

<sup>679</sup> United Nations, 'Johannesburg Plan of Action: Plan of Implementation of the World Summit on Sustainable Development' (2002) GEO 6 *Europe Suppl Ref* 31.c; FAO, *Code of Conduct for Responsible Fisheries* (Rome, 1995); Convention on Biological Diversity, *Decision adopted by the Conference of the parties to the Convention on Biological Diversity at its Seventh Meeting*, VII/5 UNEP, 7<sup>th</sup> mtg, Agenda Item 18.2, UNEP/CBD/COP/DEC/VII/5 (13 April 2004); *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) Division 3 – Whales and other cetaceans; Andrew Balmford

ecosystem management and marine mammals.<sup>680</sup> This indicates the value of Whaling Commission discussions and decisions to global environmental and marine agendas at large. Similarly, there is significant value in CAMLR Commission practice and discussion to the work of other RFBs on protected marine areas.<sup>681</sup>

The chapter proceeds in five parts. Following this introduction, Part 7.2 discusses protected areas under the *Whaling Convention* and *CAMLR Convention* and in their Commissions. Part 7.3 defines and describes NGO observer roles in relation to protected areas. Parts 7.4 and 7.5 subject NGOs roles to an object and purpose appraisal, first in the CAMLR Commission (7.4) and then the Whaling Commission (7.5). Parts 7.4 and 7.5 also consider interview and survey responses on NGO engagement with protected areas. This differs from the structure of Chapter 6. Discussion interview and survey responses highlight the diversity of views of stakeholders in both Commissions on the value of NGO contributions, and the need for an objective standard of evaluation.

The chapter concludes in Part 7.6 that misconstruction or avoidance of object and purpose principles is evident in the approaches of environmental NGOs in both Commissions. Scientific, hybrid and industrial NGOs demonstrated clear support for the work of the Commissions and the object and purpose of their conventions in all observer NGO roles. This case study demonstrates that NGOs expressing accordance with the object and purpose principles is central to the sound functioning of the Commissions. This chapter demonstrates the importance of the recommendation, expanded upon in Chapter 8, for clear expectations that all NGO observers engage with object and purpose principles.

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et al., 'The worldwide costs of marine protected areas' (2004) 101(26) *Proceedings of the National Academy of Sciences* 9694; European Environment Agency, *Marine protected areas in Europe's seas – An overview and perspectives for the future EEA Report No 3/2015* (Luxembourg, 2015).

<sup>680</sup> Sascha K Hooker and Leah R Gerber, 'Marine Reserves as a Tool for Ecosystem-Based Management: The Potential Importance of Megafauna' (2004) 51(1) *BioScience* 27; R Quentin Grafton, Tom Kompas and Viktoria Schneider, 'The Bioeconomics of Marine Reserves: A Selected Review with Policy Implications' (2005) 7 *Journal of Bioeconomics* 161.

<sup>681</sup> Miller, Sabourenkov, and Ramm, above n 147; Ceo et al, above n 9, 12, 13, 65, 78; Miller and Slicer, above n 9.

Data sources used for this chapter include the verbatim records of the Whaling Commission, archived documents from both the CAMLR Commission and the Whaling Commission, meeting records and documents and interviews. The meeting records and meeting documents are primary sources of NGO observer roles, however, so are pamphlets and documents from various meetings, obtained during the author's personal observations and attendance. Included is data from both the CAMLR and Whaling Commissions from Commissioners on state perceptions of NGO engagement around MPAs and sanctuaries.<sup>682</sup> It is noted that approximately a third of the member states for each Commission submitted a completed questionnaire. For the Whaling Commission this was forty-member states, for the CAMLR Commission, eight-member states. This response rate in the CAMLR Commission is attributable to the author's absence due to attendance at the Whaling Commission meeting, and at the Whaling Commission meeting to the sheer size of the meeting itself. Language barriers were also an issue, as noted in Chapter 1.

## 7.2 Protected areas under the Conventions

This section considers the nature of protected areas under both conventions and details the object and purpose in relation to protected areas, presenting a means of evaluating the contributions of NGOs. Both the *CAMLR Convention* and the *Whaling Convention* make specific reference to protected areas. The *Whaling Convention* authorises the designation of sanctuary areas.<sup>683</sup> The *CAMLR Convention* permits designation of areas for protection and scientific study.<sup>684</sup> The Commissions have regulatory powers that directly relate to protected area measures. These regulatory powers are temporal, spatial, species-based, quantity-based, age-, sex-, and size-based, and activity-based.<sup>685</sup>

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<sup>682</sup> This data was gathered through confidential questionnaires circulated at the annual meetings of both the CAMLR and Whaling Commissions in 2016.

<sup>683</sup> *Whaling Convention*, Article V.1.c.

<sup>684</sup> *CAMLR Convention*, Article IX.2.g.

<sup>685</sup> *Whaling Convention*, Article V; *CAMLR Convention*, Article IX.

### 7.2.1 Protected areas under the *CAMLR Convention*

The CAMLR Commission has the capacity to designate MPAs through conservation measures under Article IX of the *CAMLR Convention*. Under Article V, the Whaling Commission has the power to amend the *Whaling Convention Schedule* to create whale sanctuaries,<sup>686</sup> and to pass resolutions regarding the intentions or views of the Commission, including the subject of whale sanctuaries.<sup>687</sup>

The value of MPAs is acknowledged across the spectrum of domestic and international conservation practices.<sup>688</sup> The discussion within the CAMLR Commission is part of a larger global dialogue.<sup>689</sup> Discussion has engaged with the practical application of principles of conservation and rational use, the precautionary approach,<sup>690</sup> the ecosystem approach, and scientific evidence as the basis for decision-making.

The CAMLR Commission began deliberations on MPAs in the CAMLR Convention Area as an agenda item in 2005, following a significant intersessional workshop.<sup>691</sup> This workshop set the framework for MPA discussions, including terms of reference for Scientific Committee work, and the utility of MPAs in furthering the objectives of the *CAMLR Convention*. The workshop also highlighted the desirability of engagement with a range of stakeholders, including NGOs, at the technical and policy levels.<sup>692</sup> Prior to its own deliberations, the CAMLR Commission had engaged with the designation of protected areas within the Antarctic Treaty System (ATS) by adhering to conditions to

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<sup>686</sup> *Whaling Convention*, Article V.

<sup>687</sup> *Whaling Convention*, Article V.

<sup>688</sup> IUCN, *Marine Protection in the Southern Ocean* CCAMLR-XVI/BG/40 (20 October 1997); see Jakobsen, Kelleher and others, above n 655 through n 657.

<sup>689</sup> Ceo et al, above n 6; Miller and Slicer, above n 660.

<sup>690</sup> See above n 137.

<sup>691</sup> *Report of the CCAMLR Workshop on Marine Protected Areas* (Silver Spring, MD, USA, 29 August to 1 September 2005) SC-CAMLR-XXIV Annex 7.

<sup>692</sup> *Report of the CCAMLR Workshop on Marine Protected Areas* (Silver Spring, MD, USA, 29 August to 1 September 2005) SC-CAMLR-XXIV, Annex 7 593 [17].

protect Antarctic Specially Protected Areas (ASPAs) and Antarctic Specially Managed Areas (ASMAs) designated under the *Madrid Protocol*.<sup>693</sup>

The goal of MPA deliberations in the Commission has been to establish a representative series of MPAs to protect significant Antarctic marine ecosystems. Several proposals for MPAs within the CAMLR Area have been put forward. Early proposals were all within Contracting Government waters, including Argentinian, South African, and Australian waters.<sup>694</sup>

The United Kingdom proposal to establish an MPA in CCAMLR waters at the Southern Orkney Island southern shelf resulted in the development of Conservation Measure 91-03, creating the first CCAMLR MPA.<sup>695</sup> The South Orkney MPA has been recognised as a significant step toward establishing a representative series of MPAs in the Convention Area.<sup>696</sup> After these early discussions, the Commission focus shifted to three potential areas for designating MPAs: the Ross Sea MPA, which was designated in 2016;<sup>697</sup> the East Antarctic Sea MPA, an ongoing agenda item; and the Weddell Sea MPA.

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<sup>693</sup> *Protection of the values of Antarctic Specially Managed and Protected Areas* Conservation Measure 91-02 (2012).

<sup>694</sup> Delegation of South Africa, *Towards the creation of a Marine Protected Area around South Africa's sub-Antarctic Prince Edward Islands* CCAMLR-XXIII/BG/22; Delegation of Ukraine, *On the determination and establishment of marine protected area in the area of the Argentina Islands Archipelago* CCAMLR-XXIV/BG/19 (see also CCAMLR-XXVI/BG/11); Delegation of New Zealand, *Scientific justification for a marine protected area designation around the Balleny Islands to protect ecosystem structure and function in the Ross Sea region, Antarctica: progress report* SC-CAMLR-XXIV/BG/25; Delegation of South Africa, *Conserving pattern and process in the Southern Ocean: designing a marine protected area for the Prince Edward Islands* CCAMLR-XXV/BG/16.

<sup>695</sup> *Protection of the South Orkney Islands southern shelf* Conservation Measure 91-03 (2009).

<sup>696</sup> CCAMLR-XXXII Meeting of 23 October – 1 November 2013, 'Report of the Thirty-Second Meeting of the Commission' (Hobart, Australia, adopted 1 November 2013) [5.77]; CCAMLR-XXXIII Meeting of 20 – 31 October 2014, 'Report of the Thirty-Third Meeting of the Commission' (Hobart, Australia, adopted 31 October 2014) [5.81] per the EU; Andrea Kavanagh, 'The World's Largest MPA, Antarctica's Ross Sea' (Lecture delivered at the Institute of Marine and Antarctic Studies, Hobart, Tasmania, 7 April, 2017).

<sup>697</sup> *Ross Sea Region MPA* Conservation Measure 91-05 (2016).

The CAMLR Commission discussions around MPAs also demonstrate how NGOs contribute to the decision-making process. A range of regulatory powers enables the Commission to support management of MPAs. These include the power to designate levels of harvesting of specific species, the protection of species, the size, age, and sex of species that can be harvested, and measures relating to seasonal closures, fishing gear and harvesting methods. The significance of these regulatory powers depends on the object and purpose principles informing their interpretation. The regulatory capacities are subject to the same interpretive construction as Article IX.2.g, with foremost consideration for conservation, including rational use. Scientific evidence, conservation and science-dependent precaution must be the tools by which the Commission operationalizes an MPA under Article IX.2.

Under Article IX, the Commission has the capacity to designate ‘the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study’.<sup>698</sup> All designations are subject to any pre-existing measures implemented under the ATS, for the preservation and conservation of living resources.<sup>699</sup> The text of the *CAMLR Convention* Article IX creates two types of designation: ‘areas, regions or sub-regions’ and ‘special areas’. ‘Areas, regions or sub-regions can be opened or closed for scientific study or conservation. MPAs fall within this category. They do not fall into the latter because ‘special area’ refers to areas specifically for protection and scientific study.

The terminology ‘special area’ is also used in the *Madrid Protocol*<sup>700</sup> within the ATS. However, the meaning is not entirely consistent between the *Protocol* and the *CAMLR Convention*. Within the *Protocol* are the subcategories of ‘specially protected’ (ASPA) and ‘specially managed (ASMA), which themselves separate conservation value (protected) and scientific study (managed). The use of ‘special area’ in the *CAMLR Convention* is distinct from the *Madrid Protocol*, as Meeting Reports indicate that special

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<sup>698</sup> *CAMLR Convention*, Article IX.

<sup>699</sup> *Antarctic Treaty*, Article IX.1.f.

<sup>700</sup> *Madrid Protocols*, Annex V.

areas and MPAs are considered as distinct tools,<sup>701</sup> with special areas having a scientific focus.<sup>702</sup> This means that ‘areas...for conservation’ are distinct from ‘special areas for protection **and** scientific study’ [emphasis added]. ‘Protection’ and ‘scientific study’ are to be read conjunctively.<sup>703</sup> This clearly connects ‘special areas’ to the science and protection principles of the *Antarctic Treaty* and its *Protocol*. The general capacity to designate areas for conservation is distinctly attached to the *CAMLR Convention* and its purposes. This renders the influence of the *Antarctic Treaty* on interpretation and implementation of the Article IX in designating MPAs a lesser concern than if MPAs fell within the definition of ‘special area’.<sup>704</sup>

Decisions around designating marine protected areas (MPAs) involve extensive sessional and intersessional discussion, with working groups, informal drafting groups, and workshops to determine the direction of possible conservation measures, their wording, and the scientific basis upon which they will be established. The Commission recognizes the significance of Article II in informing the exercises of functions under Article IX.<sup>705</sup> This is through significant and ongoing engagement with the advice of the Scientific Committee in decision-making processes. The CAMLR Commission also interprets its obligations under Article IX in light of the object and purpose principles and so MPAs must be considered in light of conservation, rational use, and mankind and be consistent with the ecosystem approach and the precautionary approach.<sup>706</sup>

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<sup>701</sup> *CCAMLR-XXXI Meeting of 23 October – 1 November 2012*, ‘Report of the Thirty-First Meeting of the Commission’ (Hobart, Australia, adopted 1 November 2012) [7.60].

<sup>702</sup> *Ibid* [7.86].

<sup>703</sup> *Ibid* [8.35 – 8.36].

<sup>704</sup> Susanna M Grant, ‘The applicability of international conservation instruments to the establishment of marine protected areas in Antarctica’ (2005) 48 (9-10) *Ocean & Coastal Management* 782.

<sup>705</sup> *Report of the CCAMLR Workshop on Marine Protected Areas* (Silver Spring, MD, USA, 29 August to 1 September 2005) SC-CAMLR-XXIV, Annex 7, 586, 591 [1]; *CCAMLR-XXIII Meeting of 25 October – 5 November 2004*, ‘Report of the Twenty-Third Meeting of the Commission’ (Hobart, Australia, adopted 5 November 2004) [4.13].

<sup>706</sup> See Chapter 2 at [2.3.2].



### 7.2.2 Protected areas under the *Whaling Convention*

There are two existing sanctuaries designated under the *Whaling Convention*. These are the Indian Ocean Whale Sanctuary and the Southern Ocean Whale Sanctuary. These provide a background to the proposals for the South Atlantic Whale Sanctuary proposed and rejected over the 2010-2016 period. The Indian Ocean Whale Sanctuary was successfully designated in 1979.<sup>707</sup> There is no documentary evidence of engagement with the subject of sanctuaries by NGOs preceding this date.<sup>708</sup> The Southern Ocean Sanctuary generated significant debate, but equal success in 1994.<sup>709</sup> This trend has not held for the South Atlantic Sanctuary proposal.

The *Whaling Convention* confers power on the Commission to designate sanctuary areas through amendment of the *Whaling Convention Schedule*. Article V specifically provides that:

The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources fixing...open and closed waters, including the designation of sanctuary areas.<sup>710</sup>

The language of Article V indicates that sanctuary areas are meant to be areas free of all whaling activities – a literal sanctuary. This is in contrast to the *CAMLR Convention* Article IX where it is clear that protected areas have geographical delimitation among multiple regulatory measures for activities in a protected area. While there is no indication in the *Whaling Convention* Article V that the designation of sanctuaries

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<sup>707</sup> *IWC 30<sup>th</sup> Meeting of June 1978*, ‘Thirtieth Report of the International Whaling Commission – covering the 30<sup>th</sup> financial year 1978-1979’ (London, UK, adopted June 1979) 27: the vote being 27 for, 3 against and 3 abstentions.

<sup>708</sup> Although an interviewee contemporary with the Indian Ocean proposal in 1979 indicated that there was informal discussion of the topic of the Indian Ocean Whale Sanctuary among a number of parties, both associated with NGOs and the Scientific Committee before its appearance on the 1979 Whaling Commission agenda: Interview with Interviewee 6 (15 September 2014).

<sup>709</sup> *IWC 47<sup>th</sup> Annual Meeting of May/June 1995*, ‘Forty-Seventh Report of the International Whaling Commission – covering the financial year 1994-1995’ (Dublin, Ireland, adopted June 1995) 28.

<sup>710</sup> *Whaling Convention*, Article V.1.c.

involves any other regulatory measure besides closing waters to whaling, the general regulatory capacities of Article V can be applied within a sanctuary area as there is no exclusion of such capacity.

Article V directly incorporates the conservation and use aspects of the *Whaling Convention* object and purpose, noting that regulations are to be made ‘with respect to conservation and utilization.’ In referring to open and closed waters, Article V makes specific provision for the designation of whale sanctuaries.<sup>711</sup> This specific reference to sanctuaries amid a raft of general regulatory measures suggests that the use of sanctuaries is a key measure available to the Commission to carry out their work according to the object and purpose of the *Whaling Convention*.

Article V provides some guidelines for the purposes of regulatory measures. There are three clear expectations in relation to sanctuaries and other regulatory measures. First, regulatory measures emphasise conservation as well as current and future lethal use of whale resources.<sup>712</sup> Second, decisions to amend the Schedule and develop other regulatory measures must be based on scientific findings.<sup>713</sup> Third, measures must ‘take into consideration the interests of the consumers of whale products and the whaling industry’.<sup>714</sup> The terms ‘whale products’ and ‘whaling industry’ are the centre of many of the interpretative positions among Whaling Commission NGOs, with some NGOs interpreting ‘products’ and ‘industry’ to refer to non-lethal activities, particularly eco-tours and whale watching.

In the designation of whale sanctuaries, as with all other regulatory powers, Article V requires the Commission to consider the multiple facets of the *Whaling Convention* object and purpose, the interaction between conservation and use, the orientation of conservation to human consumption and industry, and the need for scientific data to

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<sup>711</sup> This contrasts with the *CAMLR Convention*, where MPAs, as a general marine conservation tool, have attached to the Article IX.2.g provision.

<sup>712</sup> *Whaling Convention*, Article V.2.a.

<sup>713</sup> *Whaling Convention*, Article V.2.b.

<sup>714</sup> *Whaling Convention*, Article V.2.c.

substantiate decision-making.<sup>715</sup> These connections are expressly stated in Article V, indicating clear expectations of both interpretive and practical application.

Dialogue in the Whaling Commission around whale sanctuaries, both in their proposal stage and later review, has indicated fractures in the Commission in the interpretation and execution of Article V powers at the level of the object and purpose. Practice and commentary<sup>716</sup> have indicated division over the scientific value and validity of the whale sanctuaries. There are clear expectations in Article V of the *Whaling Convention* in relation to scientific data and regulations.

Whether the terms of the *Whaling Convention* Article V require specific scientific comment or advice upon a proposed sanctuary is not clear. For example, in the case of the Southern Ocean Sanctuary, in discussion from 1990-1994, the Scientific Committee presented a range of advice and viewpoints on the value of a whale sanctuary in the Southern Ocean, with a broadly positive view of its implementation.<sup>717</sup> However, the value to the Commission of this viewpoint, which was based on conjecture rather than hard data, was called into question.<sup>718</sup> Commission decision-making has been construed in two ways. The first is that Commission decisions could be made without reference to scientific data.<sup>719</sup> The other is that scientific advice is necessary to the decision-making of the Commission.<sup>720</sup> Neither takes clear precedence in decision-making. However, the *Whaling Convention* requires that the sanctuaries be based on scientific information,

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<sup>715</sup> *Whaling Convention*, Article V.2.

<sup>716</sup> Interview with Interviewee 6 (15 September 2014).

<sup>717</sup> IWC Scientific Committee, '1994 Report of the Scientific Committee' (1994) 44 *Report of the International Whaling Commission* 41, 58-59; IWC Scientific Committee, '1995 Report of the Scientific Committee' (1995) 45 *Report of the International Whaling Commission* 53; IWC Scientific Committee, '1995 Report of the Scientific Committee' (1995) 45 *Report of the International Whaling Commission* 53, 86.

<sup>718</sup> IWC Scientific Committee, '1995 Report of the Scientific Committee' (1995) 45 *Report of the International Whaling Commission* 53, 86.

<sup>719</sup> IWC 45<sup>th</sup> Annual Meeting of July 1993, 'Forty-Fifth Report of the International Whaling Commission – covering the financial year, 1993-1994' (Glasgow, United Kingdom, adopted July 1994) 28, the Chair stating that 'the Commission has the power to make decisions on management or conservation.'

<sup>720</sup> IWC Scientific Committee, '1994 Report of the Scientific Committee' (1994) 44 *Report of the International Whaling Commission* 41, 86.

with the clear objective of developing conservation aims for the purposes of enabling the whaling industry to continue.<sup>721</sup> Considering the *Whaling Convention* Article V against the *CAMLR Convention* Article IX, there are clear similarities firstly with conservation aims, but also in terms of dependence on scientific data for decision-making, and an expectation of use.

### 7.3 Observer NGO roles in respect of protected areas

Protected area designation in both the CAMLR and Whaling Commissions attracted the contributions of environmental NGOs, scientific NGOs, and the IUCN during the study periods. Industry NGOs in both Commissions have been less vocal than environmental NGOs, with environmental NGOs dominating NGO contributions. The dominant NGO contributor on the topic of MPAs in the CAMLR Commission is the environmental NGO, ASOC, through the formal oral and documentary mechanisms for observer participation in the CAMLR Commission. ASOC has been the sole user of informal protest roles available to observers in relation to MPAs and other matters. The scientific NGO, SCAR, is the dominant contributor to the practical support of the CAMLR Commission and its Scientific Committee on the subject of MPAs. The two industry NGOs, ARK and COLTO, made no independent contributions on the topic of MPAs, however ARK did collaborate with ASOC and three member-states in discussing the significance of MPAs to krill conservation,<sup>722</sup> and both industry NGOs contribute to the Commission through the provision of catch data.

The primary contributors in the Whaling Commission on whale sanctuaries have been a high number of environmental NGOs. There is a clear division in the contributions of environmental NGO observers: Environmental NGOs that are also anti-whaling, consistently advocate for the designation of whale sanctuaries. Environmental NGOs that are pro-whaling make statements that support the use of the Revised Management Procedure (RMP) rather than the designation of whale sanctuaries as the most effective

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<sup>721</sup> *Whaling Convention*, Article V.2.b; Preamble.

<sup>722</sup> United Kingdom, Norway, Chile, ASOC and ARK, *Bridging the krill divide: understanding cross-sector objectives for krill fishing and conservation* SC-CAMLR-XXXIII/BG/34 (20 September 2014) 13 and 15. In this paper the ARK representative indicated that there was MPA designation was of little significance to krill fisheries.

vehicle for whale conservation. There has been consistent opposition to the designation of sanctuaries from pro-whaling industry and environmental NGOs.<sup>723</sup>

### 7.3.1 CAMLR Commission – NGO roles

In the CAMLR Commission, NGO engagement has presented information to promote a consensus vote to designate MPAs. There has been extensive use of the formal mechanisms for submitting information papers and speaking to the agenda, and use of informal engagement mechanisms, such as staging events and distributing information in informal meeting spaces. Contributors to the MPA issue in the CAMLR Commission are: the hybrid NGO, the IUCN; environmental NGO, ASOC; and the scientific NGO, Scientific Committee for Antarctic Research (SCAR). Aside from its collaborative work, ARK's engagement with MPAs indicates that MPAs were not high on member company agendas.<sup>724</sup> Neither ARK nor the Coalition of Legal Toothfish Operators (COLTO) made any direct contribution to the discussion. However, it is important to note that as industry NGOs representing many companies operating fishing fleets in the Southern Ocean, ARK and COLTO assist the CAMLR Commission in monitoring MPAs. ARK and COLTO vessels already contribute to implementation roles in relation to IUU fishing, as

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<sup>723</sup> ICFA, *International Coalition of Fisheries Associations statement to the 44<sup>th</sup> meeting of the IWC* IWC/44/OS ICFA (1992); International Coalition of Fisheries Associations, *The 45<sup>th</sup> Annual IWC Meeting: Opening Statement of the ICFA* IWC/45/OS ICFA (1993); ICFA, *The 46<sup>th</sup> Annual IWC Meeting, Opening Statement of the International Coalition of Fisheries Associations* IWC/46/OS ICFA (1994); GGT, *Opening Statement of Global Guardian Trust* IWC/47/OS GGT (1995); JWA, *Opening Statement by the Japan Whaling Association* IWC/47/OS JWA (1995); Riches of the Sea, *Opening Statement of the Riches of the Sea* IWC/47/OS RS (1995).

<sup>724</sup> United Kingdom, Norway, Chile, ASOC and ARK, *Bridging the krill divide: understanding cross-sector objectives for krill fishing and conservation* SC-CAMLR-XXXIII/BG/34 (20 September 2014) ARK co-submitted this joint report with the United Kingdom, Chile and ASOC on cross-sectoral impacts on krill fisheries. This report addressed MPAs among other topics. Within the report, it was noted that ARK supported initiatives that facilitated the science that supported ecosystem and fisheries analysis, which bear indirectly on MPAs. Both of these scientific subjects support the designation of MPAs. However, industry representatives, including Aker Biomarine (ARK), placed the location of MPAs as low in priority in relation to krill fisheries. This was in contrast to several ASOC members and independent NGOs, present at the meeting from which the report arose. These ASOC members unanimously identified that 'MPAs were important for achieving objectives and aspirations for the krill-based ecosystem and fishery'.

fishing vessels in the Southern Ocean provide catch data to the Commission, in the otherwise uninhabited region.<sup>725</sup>

Before the inclusion of MPAs on the Commission's 2005 agenda, the IUCN had contributed background papers to the Commission,<sup>726</sup> advocating for discussion of MPAs.<sup>727</sup> Subsequent to this advocacy, the IUCN participated in the 2005 Workshop that informed the ensuing work of the Commission.<sup>728</sup> The IUCN contributed expert advisers, and a paper to the workshop.<sup>729</sup> ASOC contributed to the MPA debate through formal and informal means associated with Commission meeting attendance. This involved lobbying and demonstrations outside of the formal meeting structure, the circulation of informal documents, addressing the Commission on the agenda, and submitting information papers for the Commission's consideration.

SCAR roles include working paper submissions to the CAMLR Commission.<sup>730</sup> However, more significant is SCAR's intersessional work on the Scientific Committee on Antarctic

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<sup>725</sup> *Five-day Catch and Effort Reporting System* Conservation Measure 23-01 (2016); *Ten-day Catch and Effort Reporting System* Conservation Measure 23-02 (2016); *Monthly Catch and Effort Reporting System* Conservation Measure 23-03 (2016); *Monthly Fine-Scale Catch and Effort Data Reporting System for Trawl, Longline and Pot Fisheries* Conservation Measure 23-04 (2016); *Monthly Fine-Scale Biological Data Reporting System for Trawl, Longline and Pot Fisheries* Conservation Measure 23-05 (2000); *Data Reporting System for Euphausia superba Fisheries* Conservation Measure 23-06 (2012); *Daily Catch and Effort Reporting System for Exploratory Fisheries, with the exception of exploratory krill fisheries* Conservation Measure 23-07 (2016).

<sup>726</sup> IUCN, *Marine Protection in the Southern Ocean* CCAMLR-XVI/BG/40 (20 October 1997); IUCN, *Area-based Conservation and Management Measures utilized under CCAMLR* CCAMLR-XXV/BG18 (19 September 2006); IUCN, *A summary of the guidelines for applying the IUCN protected area management categories to Marine Protected Areas (supplementary to the 2008 Guidelines)* CCAMLR-XXXI/BG/18 (22 September 2012).

<sup>727</sup> IUCN, *Marine Protection in the Southern Ocean* CCAMLR-XVI/BG/40 (20 October 1997); IUCN, *Report to the World Conservation Union (IUCN) to the CCAMLR* CCAMLR-XVI/BG/37 (27 October 1997); IUCN, *Report of the World Conservation Union (IUCN)* CCAMLR-XXI/BG/34 (22 October 2002).

<sup>728</sup> *Report of the CCAMLR Workshop on Marine Protected Areas* (Silver Spring< MD, USA, 29 August to 1 September 2005) SC-CAMLR-XXIV Annex 7, 591 [5].

<sup>729</sup> *Ibid* 592 [8].

<sup>730</sup> *SCAR biology symposium* (Curitiba, Brazil, 25 to 29 July 2005) Workshop on marine protected areas (27 July 2005) WS-MPA-05/13; SCAR, *The CAMLR/SCAR-MarBIN Biogeographic Atlas of the Southern Ocean* CCAMLR-XXX/BG/11; SCAR, *Annual report*

Research – Marine Biodiversity Information Network (SCAR MAR-Bin), a database dedicated to the collation of data on Antarctic research. This database facilitates scientific research and work within the Antarctic. This clearly supports a core element of the *CAMLR Convention* object and purpose by providing scientific data. As a significant NGO within the ATS and in being a scientific organization solely dedicated to Antarctic scientific research, SCAR is uniquely positioned. The knowledge enhancement contributions of SCAR happen both within meetings and intersessionally to the CAMLR Commission and other Antarctic Treaty organs.<sup>731</sup>

### 7.3.2 Whaling Commission – NGO roles

The 2010 – 2016 period of discussion around the South Atlantic Sanctuary focussed on the lead up to the 2016 Sanctuary proposal. While there were several different proposals for a South Atlantic Whale Sanctuary from 2001 – 2016,<sup>732</sup> the 2016 proposal saw substantial hybrid and environmental NGO engagement on the issue of sanctuaries, and some opposition from industry NGOs and pro-whaling environmental NGOs through Opening Statements. The submission of Opening Statements across the 2010 – 2016 period demonstrated a divide between NGOs engaging exclusively with conservation and those emphasising the need for a scientific approach to conservation, bearing in mind future use of whale resources. Global Guardian Trust (GGT), was the sole pro-whaling environmental NGO to address the Sanctuary issue through Opening

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from SCAR to CCAMLR CCAMLR-XXVIII/BG/34; SCAR, *Annual report from SCAR to CCAMLR* CCAMLR-XXIX/BG/15; SCAR, *Annual report from SCAR to CCAMLR* CCAMLR-XXX/BG/15.

<sup>731</sup> SCAR, *Annual report from SCAR to CCAMLR* CCAMLR-XXX/BG/15, 3.

<sup>732</sup> Voting on proposed Schedule amendments to create a South Atlantic Whale Sanctuary (South Atlantic Sanctuary) were not successful over the course of the 15 years it has been considered by the Commission. From 2001-2004 (IWC-53 – IWC-56) both South Pacific and South Atlantic Sanctuary proposals were voted upon. In 2005, 2007, 2011 (deferred), 2012, 2014 and 2016 (IWC-57, IWC-59, IWC-63, IWC-64, IWC-65, and IWC- 66) the Commission voted on the South Atlantic Sanctuary. Each year these sanctuaries were proposed the vote did not reach the requisite three-quarter majority.

Statements. It highlighted the need for a scientific basis for sanctuary designation in 2010<sup>733</sup> but left the issue alone in subsequent years.

There were diverse pro-whaling environmental NGOs highlighting the conservation value of designating a sanctuary in the South Atlantic,<sup>734</sup> with some limited references to the scientific value of sanctuaries.<sup>735</sup> The IUCN expressed support for the South Atlantic Sanctuary, referring to ongoing management requirements, and its capacity to contribute expertise. It almost avoided the divisions on the lethal use issue by recognising the need to defer decision making until a future date. However, the exclusion of any lethal activities from designated sanctuary areas under Article V meant that the IUCN also excluded consideration of how the sanctuary would impact on potential future lethal use of whale resource:<sup>736</sup>

*‘We see the proposed Sanctuary as a long-term measure that should help ensure that potential impacts on cetaceans are taken into account at an early stage in future decisions regarding the management and use of marine areas within the Sanctuary.’*

The words ‘future decisions regarding the management and use of marine areas within the Sanctuary’ avoids consideration of lethal use by restricting focus to within the sanctuary area. This reflects the language of its own World Conservation Congress

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<sup>733</sup> GGT, *Opening Statement to the 62<sup>nd</sup> Annual Meeting of the IWC* IWC/62/OS GGT (2010).

<sup>734</sup> Natural Resources Defense Council, *Opening Statement* IWC/62/OS NRDC (2010); Organización para la Conservación de Cetáceos, *OCC Opening Statement* IWC/62/OS OCC (2010); PEW Environment Group, *Opening Statement: PEW Environment Group* IWC/62/OS PEW (2010); ASOC, *Opening Statement* IWC/63/OS ASOC (2011); AWI, *Opening Statement* IWC/63/OS AWI (2011); Humane Society International, *Opening Statement* IWC/63/OS HSI (2011); Natural Resources Defense Council, *Opening Statement* IWC/63/OS NRDC (2011); Ocean Care and ProWildlife, *Joint Opening Statement* IWC/63/OS OC (2011); WWF, *Opening Statement* IWC/63/OS WWF (2011); Green Vegans, *Opening Statement* IWC/64/OS GV (2012); NRDC, *Opening Statement* IWC/64/OS NRDC (2012); WWF, *Opening Statement* IWC/64/OS WWF (2012); Animal Welfare Institute, *Opening Statement* IWC/65/OS AWI (2014); WWF, *Opening Statement* IWC/65/OS WWF (2014); WWF, *WWF IWC66 Opening Statement* IWC/66/OS WWF (2016).

<sup>735</sup> Greenpeace, *Greenpeace Opening Statement* IWC/65/OS Greenpeace (2014).

<sup>736</sup> IUCN, *Statement*, IWC/66/OS IUCN (2016).



(WCC) resolution on the South Atlantic Proposal. The resolution used language that did not refer to the *Whaling Convention* object and purpose, although it did emphasise the broader international law obligations under Article 65 of the *Law of the Sea Convention*.

Speaking rights were engaged from in 2012, 2014 and 2016,<sup>737</sup> and informal observer-associated behaviours were in evidence at the 2016 Whaling Commission meeting.<sup>738</sup> The 2012 amendments to the *Whaling Commission Rules of Procedure* resulted in NGOs speaking to the agenda item of the sanctuary in 2012, 2014 and 2016. However, spoken statements were limited to expressions of support and contained no reference to the basis of the support.<sup>739</sup> In 2012, the Green Association of Panama ‘thanked the proponents and supporters of the proposal and urged them to continue working to make the sanctuary a reality.’<sup>740</sup> In 2014, the environmental NGO, Instituto de Conservación Ballenas (ICB) and the hybrid NGO, International Wildlife Management

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<sup>737</sup> *IWC 64th Meeting of July 2012*, ‘Annual Report of the International Whaling Commissions 2012 – covering the 2011-2012 financial year’ (Panama City, Panama, adopted July 2012) 60; *Chair’s Report in IWC 65th Annual Meeting of October 2014*, ‘Annual Report of the International Whaling Commission 2014 – covering the July 2012 – October 2014 financial year’ (Portorož, Slovenia, adopted October 2014) [81], 11; *Chair’s Report IWC 66th Annual Meeting of October 2016*, ‘Annual Report of the International Whaling Commission 2016 – covering the October 2014 – October 2016 financial year’ (Portorož, Slovenia, adopted October 2016) [62], 7.

<sup>738</sup> A primary environmental NGO activity was a ‘South Atlantic Whale Sanctuary’ forum. Pens, folders, ribbons and notepads branded with a South Atlantic Whale Sanctuary logo were handed out to attendees, and a video and slide show presentation were given, with speeches from both NGOs and Latin American member state delegates: author’s own observation at Santuario de Balenos de Atlantico Sul – South Atlantic Whale Sanctuary presentation, Sunday 4pm, 23<sup>rd</sup> October 2016).

<sup>739</sup> *IWC 64th Meeting of July 2012*, ‘Annual Report of the International Whaling Commissions 2012 – covering the 2011-2012 financial year’ (Panama City, Panama, adopted July 2012) 60; *IWC 65th Annual Meeting of October 2014*, ‘Annual Report of the International Whaling Commission 2014 – covering the July 2012 – October 2014 financial year’ (Portorož, Slovenia, adopted October 2014) 12-13; *Chair’s Report of the 66th Meeting of the International Whaling Commission* (24-28 October 2016 Portorož, Slovenia) 10-11.

<sup>740</sup> *IWC 64th Meeting of July 2012*, ‘Annual Report of the International Whaling Commissions 2012 – covering the 2011-2012 financial year’ (Panama City, Panama, adopted July 2012) 60.

Consortium World Conservation Trust (IWMCT) expressed support for and opposition to the sanctuary, respectively.<sup>741</sup>

The 2014 verbatim records indicate that the IWMCT maintained that decision-making should be based on scientific advice, and that ‘science had said that there is no ecological justification for the establishment of another sanctuary.’<sup>742</sup> However, in June 2016, the Scientific Committee found that the management plan was adequate to establish the South Atlantic Sanctuary.<sup>743</sup> With this development, it was unsurprising that the IWMCT did not speak to this agenda item in 2016. In the same 2014 verbatim records, the ICB contribution to Commission discussion on the South Atlantic Sanctuary proposal avoided recognising lethal use as a legitimate aspect of the *Whaling Convention*, placing the proposal within the framework of the *Law of the Sea Convention* obligations for marine mammals.<sup>744</sup> Connections were made between conservation and the sanctuary, as would be expected, but the interest of coastal communities in whale watching was posited as a significant aspect of the proposal.<sup>745</sup> The framework of the *Whaling Convention* was not the fundamental reference point.

In 2016, the IUCN and the ICB stated their support for the Sanctuary proposal. The IUCN’s work on protected areas, within its World Conservation Congress (WCC)<sup>746</sup> was

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<sup>741</sup> IWC 65<sup>th</sup> Annual Meeting of October 2014, ‘Annual Report of the International Whaling Commission 2014 – covering the July 2012 – October 2014 financial year’ (Portorož, Slovenia, adopted October 2014) 12.

<sup>742</sup> IWMCT, *Statement in Plenary discussion on Agenda Item 5.1*, IWC65 (2014) Plenary Session 1, 16<sup>th</sup> October 2014 (from 16:41 audio file) <https://archive.iwc.int/pages/search.php?search=%21collection223&k=>.

<sup>743</sup> IUCN World Conservation Congress (WCC), *South Atlantic Whale Sanctuary* WCC-2016-Res-091-EN (6.091) (2016, Hawai’i); IWC Scientific Committee, ‘2016 Report of the Scientific Committee’ (2017) 18 *Journal of Cetacean Resource Management (Suppl)* 1 [19.1.2], 91.

<sup>744</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1883 UNTS 3 (entered into force 16 November 1994) Articles 65 and 194.

<sup>745</sup> ICB, *Statement in Plenary discussion on Agenda Item 5.1*, IWC65 (2014) Plenary Session 1, 16<sup>th</sup> October 2014 (from 19:28 audio file) <https://archive.iwc.int/pages/search.php?search=%21collection223&k=>.

<sup>746</sup> IUCN World Conservation Congress (WCC), *South Atlantic Whale Sanctuary* WCC-2016-Res-091-EN (6.091) (2016, Hawai’i).

referred to by Costa Rica as part of its reason for a 'yes' vote.<sup>747</sup> The WCC resolution supported the designation of a South Atlantic Sanctuary for reasons that were unrelated to the *Whaling Convention*. No pro-whaling environmental NGOs spoke on the agenda item.

In 2016, the South Atlantic Sanctuary was promoted through a state-sponsored presentation on the sanctuary, coordinated with several environmental NGOs, including Greenpeace, ICB, and the Organización para la Conservación de Cetáceos (OCC).<sup>748</sup> The NGOs supporting the initiative are located in South Atlantic countries, particularly Argentina, Brazil and Uruguay. The presentation was accompanied by promotional materials, including ribbons, folders, USB drives, stickers and lapel pins with sanctuary branding. A photo display in support of the sanctuary was prominently displayed with the state and NGO sponsors emblazoned on the three banners.<sup>749</sup> However, there was no substantive content of relevance to the Commission or its convention. The primary arguments focused on the economic, cultural and social benefits of the sanctuary to national populations for the purposes of whale watching and did not reference the framework of the *Whaling Convention* itself. Use was discussed at the presentation, but the use was for whale watching and eco-tourism.

In general, the anti-whaling environmental NGOs presented content that avoided the intersection of use, future use and conservation. Developments in the Scientific Committee's review of the South Atlantic proposal meant that despite the absence of scientific bases in earlier statements, by 2016 there was clear accord within the decision-making of the Commission to allow for consideration of this aspect of the object and purpose. However, the statements from NGOs, both oral and written, were mixed in terms of the reference to scientific bases for their positions. The IUCN excluded consideration of lethal use from its oral and written contributions, referencing a document that contained no support for the legal framework of the Whaling Commission. Pro-whaling hybrid NGO, IWMC held a position requiring scientific data,

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<sup>747</sup> *Chair's Report of the 66th Meeting of the International Whaling Commission 24-28 October 2016 Portorož, Slovenia*, 11.

<sup>748</sup> Santuario de Balenos de Atlantico Sul – South Atlantic Whale Sanctuary presentation, Sunday 4pm, 23<sup>rd</sup> October 2016).

<sup>749</sup> See Appendix 4.

and in not presenting further oral discussion on the sanctuary in 2016 indicated acquiescence to the position taken by the Scientific Committee.

## 7.4 Object and purpose analysis of MPA-related NGO roles in the CAMLR Commission

NGO submissions to the Commission can be assessed in terms of their accordance with the object and purpose principles of the *CAMLR Convention*. In analysing formal roles, key indicators of accordance with the object and purpose require that subject to the primary principles of conservation and rational use, NGO contributions should evince a precautionary approach, founded in scientific data, that contributes to the long-term health and useability of ecosystems and marine living resources.

To demonstrate accordance with the object and purpose principles, NGO contributions should therefore:

5. *Recognise* the interests of states in the **use** of marine living resources (MLR);
6. *Cite* credible **scientific** data and sources in promoting MPAs as a conservation tool;
7. **Refrain from pushing** beyond the boundaries of the precautionary and ecosystem approaches to argue for **conservation for conservation's sake**; and
8. *Consider* **rational use** or *not exclude* it from conservation advocacy.

NGO roles bearing on MPAs in the CAMLR Commission are evaluated by reference to these criteria.

### 7.4.1 ASOC

ASOC frequently neglected to address the rational use aspect of conservation in Article II.2. Accordingly, until 2016, it did not recognise the interests of states in the rational use of marine living resources. The emphasis placed upon conservation by ASOC arguably excluded the principle of rational use from the conservation dialogue, and so failed to address the full range of the Convention's object and purpose.

The emphasis of ASOC was primarily on conservation as the objective of the *CAMLR Convention* in Article II.1. The weight of papers presented by ASOC to the Commission and the content of the interventions were significantly directed toward conservation.

The active use of careful and considered research presenting key scientific findings from a variety of sources clearly supported the principle of scientific cooperation and advice, as well as the science-reliant precautionary approach. However, the sustained absence of rational use prevented object and purpose-compliant contributions from ASOC to the MPA deliberations. In other contexts, members of ASOC, such as Pew Charitable Trusts have highlighted the value of protected areas to fishing in the form of increases in both population size and individual biomass.<sup>750</sup> However, this awareness was only infrequently emphasised in the Commission.<sup>751</sup>

Informally distributed materials were also conservation-oriented or lacked reference to object and purpose principles at all. For example, a pamphlet distributed in 2011 by ASOC member Antarctic Ocean Alliance (AOA), was titled ‘The world is watching and time is ticking’ emphasising that ‘1.3 million people in 121 countries have joined the call .... For Antarctic marine protection.’ This included Leonardo DiCaprio, Jacques Cousteau’s grandson, and Prince Albert II. In advocating for MPAs, these and other high-profile individuals received a full page of coverage, while climate change impacts received half a page.<sup>752</sup> AOA also distributed a pamphlet presenting the reasons for establishing MPAs and marine reserves.<sup>753</sup> While this paper emphasised the precautionary principle, conservation, and scientific endeavours, the section on the

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<sup>750</sup> Andrea Kavanagh, ‘The World’s Largest MPA, Antarctica’s Ross Sea’ (Lecture delivered at the Institute of Marine and Antarctic Studies, Hobart, Tasmania, 7 April 2017).

<sup>751</sup> *CCAMLR-XXX Meeting of 24 October – 4 November 2011*, ‘Report of the Thirtieth Meeting of the Commission’ (Hobart, Australia, adopted 4 November 2011) [7.43]; ASOC, *How fishing and marine protection can coexist in the Southern Ocean: An economic analysis of the Ross Sea and East Antarctic MPA proposals* CCAMLR-XXXV/BG/23 (17 September 2016).

<sup>752</sup> Antarctic Ocean Alliance, *The World is Watching and Time is Ticking* (pamphlet distributed at CCAMLR, Hobart, October 2011).

<sup>753</sup> Antarctic Ocean Alliance, *Key Principles in Designating Marine Protected Areas and Marine Reserves*, (pamphlet distributed at CCAMLR, Hobart, October 2011).

benefits of MPAs and marine reserves did not note the significant benefit to commercial fisheries that follows on from establishing MPAs.<sup>754</sup>

Other informal documents, particularly the ECO publication, distributed by ASOC members at CAMLR Commission meetings, placed in break rooms and on delegate tables consistently emphasised all aspects of the object and purpose principles except rational use.<sup>755</sup> While there were elements of light-heartedness to these papers, there were quite serious criticisms of member states as ‘cynically delay[ing]’ consensus or ‘block[ing] to justify short-term objectives’<sup>756</sup> There was also rejection of rational use concerns.<sup>757</sup> This type of engagement is unlikely to be conducive to developing consensus, particularly in light of failures identified in ASOC’s networks and abilities to engage with member states such as Russia and China.<sup>758</sup> The conservation position of ASOC accorded strongly with a majority of states within the CAMLR Commission. However, the deliberations had to convince fishing member states, which were

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<sup>754</sup> Kavanagh, above n 750; *CCAMLR-XXX Meeting of 24 October – 4 November 2011*, ‘Report of the Thirtieth Meeting of the Commission’ (Hobart, Australia, adopted 4 November 2011) [7.43].

<sup>755</sup> Ah Lee Ming et al., *ECO No 1: The Heart of CCAMLR* (Pamphlet distributed at CCAMLR, Hobart, 21 October 2013); Ah Lee Ming et al., *ECO No 2: No title* (Pamphlet distributed at CCAMLR, Hobart, 25 October 2013); Ah Lee Ming et al., *ECO No 3: Warning: Zombie MPAs!!!* (Pamphlet distributed at CCAMLR, Hobart, 31 October 2013); Ah Lee Ming et al., *ECO No 1: The ABCs of MPAs* (Pamphlet distributed at CCAMLR, Hobart, 20 October 2017); Ah Lee Ming et al., *ECO No 2: A wish list for the special area for scientific study* (Pamphlet distributed at CCAMLR, Hobart, 26 October 2017).

<sup>756</sup> Ah Lee Ming et al., *ECO No 1: The Heart of CCAMLR* (Pamphlet distributed at CCAMLR, Hobart, 21 October 2013) stating MPAs are ‘not about sectoral fisheries management – this is about biodiversity conservation’; Ah Lee Ming et al., *ECO No 1: The ABCs of MPAs* (Pamphlet distributed at CCAMLR, Hobart, 20 October 2017) describing ‘access to fish, fishing and fishing grounds’ as ‘short-term objectives’.

<sup>757</sup> Ah Lee Ming et al., *ECO No 1: The Heart of CCAMLR* (Pamphlet distributed at CCAMLR, Hobart, 21 October 2013) stating MPAs are ‘not about sectoral fisheries management – this is about biodiversity conservation’; Ah Lee Ming et al., *ECO No 1: The ABCs of MPAs* (Pamphlet distributed at CCAMLR, Hobart, 20 October 2017) describing ‘access to fish, fishing and fishing grounds’ as ‘short-term objectives’; Ah Lee Ming et al., *ECO No 2: A wish list for the special area for scientific study* (Pamphlet distributed at CCAMLR, Hobart, 26 October 2017); Ah Lee Ming et al., *ECO No 1: The Heart of CCAMLR* (Pamphlet distributed at CCAMLR, Hobart, 21 October 2013).

<sup>758</sup> Interview with Interviewee 18 (1 December 2014).

withholding consensus, of the positive relationship of MPAs to continued fishing interests. In this, the failure to address the central object and purpose principle of ‘use’ may have contributed to significant delay in the achievement of MPA designation.

#### 7.4.2 Member state and stakeholder views on ASOC participation in MPA designation

It was possible to assess the reception of ASOC contributions within the Commission. Interviewees associated with the CAMLR Commission demonstrated the wide range of views taken of ASOC as an NGO contributor. The efficacy of ASOC in engaging with the consensus decision-making structure to push for MPA designation was questioned by one interviewee<sup>759</sup> but lauded by another.<sup>760</sup> This dichotomy was also observable in relation to the overall value of NGO contributions to the MPA debate.<sup>761</sup> However there was also a view that ASOC was fundamentally powerless. One interviewee stated that in influencing Commission debate NGOs were ‘almost irrelevant before they start – it’s a reality’.<sup>762</sup> An interviewee with strong NGO ties noted that ASOC had little capacity to ‘pick [an issue] up and push an agenda’.<sup>763</sup> Another interviewee thought that the ASOC push for MPAs was a sideline to and a distraction from the Commission’s core work of krill fishery regulation.<sup>764</sup> Another described the MPA issue as ‘a circus’ and a distraction from the serious regulatory work of the Commission.<sup>765</sup>

This divide was also observable in the member state questionnaires answered at the 2016 CAMLR Commission annual meeting. However, states were far less critical of ASOC contributions than the non-state actor interviewees. It is noted that only eight of the 25-member states returned questionnaires. However, due to confidentiality issues no state

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<sup>759</sup> Interview with Interviewee 18 (1 December 2014).

<sup>760</sup> Interview with Interviewee 4 (30 October 2014).

<sup>761</sup> Interview with Interviewee 4 (30 October 2014); Interview with Interviewee 18 (1 December 2014).

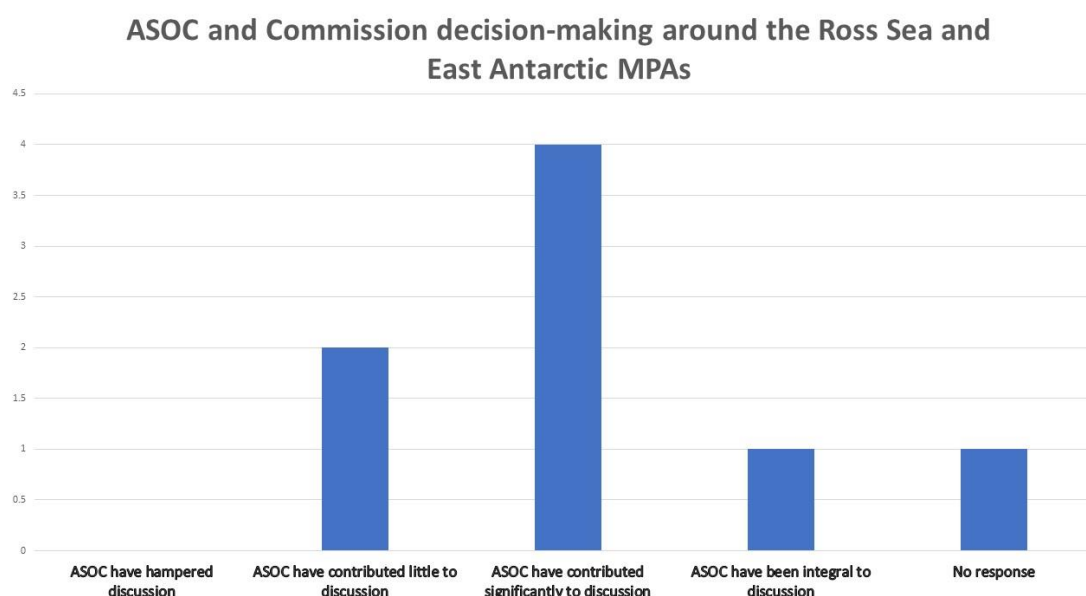
<sup>762</sup> Interview with Interviewee 11 (2 November 2015).

<sup>763</sup> Interview with Interviewee 4 (30 October 2014).

<sup>764</sup> Interview with Interviewee 12 (8 December 2014).

<sup>765</sup> Interview with Interviewee 5 (28 April 2016).

party interviews were conducted, so these anonymous questionnaires provide the only insight into member state views of NGO contributions.



*Figure 7.1 Results from 2016 anonymous member state survey on NGO roles in the CAMLR Commission*

While five member-states clearly valued the contributions of ASOC to the MPA discussion, two member states viewed ASOC contributions as ‘little’, and another member state did not respond to this question. Overall, this view is more positive than that of interviewees.

Arguably, the diversity of responses validates the utility of an object and purpose analysis. Such analysis can provide a constant reference point to measure NGO contributions by the nature of the contributions rather than subjective perception of value. The number of contributions from ASOC requires a constant reference point. From its first Commission meeting oral and documentary submissions in 2006 through to 2016, ASOC submitted 25 background papers and exercised speaking privileges on the topic of MPAs 26 times in the same period. In 2015 alone, ASOC addressed the Commission seven times on the issue of MPAs. The content of the interventions and statements from the ASOC delegation primarily advocated for MPAs,<sup>766</sup> with some

<sup>766</sup> *CCAMLR-XXV Meeting of 23 October – 3 November, 2006*, ‘Report of the Twenty-Fifth Meeting of the Commission’ (Hobart, Australia, adopted 3 November 2006) [6.5], [16.9]; *CCAMLR-XXVI Meeting of 22 October – 2 November, 2007*, ‘Report of the Twenty-Sixth Meeting of the Commission’ (Hobart, Australia, adopted 2 November 2006) [7.17];



significant legal interpretation of the Convention,<sup>767</sup> contributions to knowledge enhancement,<sup>768</sup> minor references to policy development,<sup>769</sup> and some discussion of

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*CCAMLR-XXVII Meeting of 27 October – 7 November, 2008*, 'Report of the Twenty-Seventh Meeting of the Commission' (Hobart, Australia, adopted 7 November 2008) [7.14], [16.8]; *CCAMLR-XXVIII Meeting of 26 October – 6 November, 2009*, 'Report of the Twenty-Eight Meeting of the Commission' (Hobart, Australia, adopted 6 November 2009) [7.17]; *CCAMLR-XXIX Meeting of 25 October – 5 November, 2010*, 'Report of the Twenty-Ninth Meeting of the Commission' (Hobart, Australia, adopted 5 November 2010) [7.20], [14.2]; *CCAMLR-XXX Meeting of 24 October – 4 November, 2011*, 'Report of the Thirtieth Meeting of the Commission' (Hobart, Australia, adopted 4 November, 2011) [7.43]; *CCAMLR-XXXI Meeting of 23 October – 1 November, 2012*, 'Report of the Thirty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2012) [7.67], [7.104], [9.10]; *CCAMLR-XXXII Meeting of 23 October – 1 November, 2013*, 'Report of the Thirty-Second Meeting of the Commission' (Hobart, Australia, adopted 1 November, 2013) [7.57], [9.8]; *CCAMLR-XXXIII Meeting of 20 – 31 October, 2014*, 'Report of the Thirty-Third Meeting of the Commission' (Hobart, Australia, adopted 31 October, 2014) [7.76], [9.12]; *CCAMLR-XXXIV Meeting of 19-30 October 2015*, 'Report of the Thirty-Fourth Meeting of the Commission' (Hobart, Australia, adopted 30 October 2015) [8.52], [8.93] [8.122] [9.27] [10.10].

<sup>767</sup> *CCAMLR-XXX Meeting of 24 October – 4 November 2011*, 'Report of the Thirtieth Meeting of the Commission' (Hobart, Australia, adopted 4 November 2011) [7.43]; *CCAMLR-XXXI Meeting of 23 October – 1 November 2012*, 'Report of the Thirty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2012) [9.10]; *CCAMLR-XXXII Meeting of 23 October – 1 November 2013*, 'Report of the Thirty-Second Meeting of the Commission' (Hobart, Australia, adopted 1 November 2013) [5.90]; *CCAMLR-XXXIII Meeting of 20 – 31 October 2014*, 'Report of the Thirty-Third Meeting of the Commission' (Hobart, Australia, adopted 31 October 2014) [9.12]; *CCAMLR-XXXIV Meeting of 19-30 October 2015*, 'Report of the Thirty-Fourth Meeting of the Commission' (Hobart, Australia, adopted 30 October 2015) [8.106].

<sup>768</sup> *CCAMLR-XXV Meeting of 23 October – 3 November 2006*, 'Report of the Twenty-Fifth Meeting of the Commission' (Hobart, Australia, adopted 3 November 2006) [16.9]; *CCAMLR-XXVIII* (2009) [7.17]; *CCAMLR-XXXIII Meeting of 20 – 31 October 2014*, 'Report of the Thirty-Third Meeting of the Commission' (Hobart, Australia, adopted 31 October 2014) [7.76].

<sup>769</sup> *CCAMLR-XXVI Meeting of 22 October – 2 November 2007*, 'Report of the Twenty-Sixth Meeting of the Commission' (Hobart, Australia, adopted 2 November 2007) [7.17]; *CCAMLR-XXIX Meeting of 25 October – 5 November 2010*, 'Report of the Twenty-Ninth Meeting of the Commission' (Hobart, Australia, adopted 5 November 2010) [7.20]; *CCAMLR-XXXI Meeting of 23 October – 1 November 2012*, 'Report of the Thirty-First Meeting of the Commission' (Hobart, Australia, adopted 1 November 2012) [7.67]; *CCAMLR-XXXII Meeting of 23 October – 1 November 2013*, 'Report of the Thirty-Second Meeting of the Commission' (Hobart, Australia, adopted 1 November 2013) [5.90].

review procedures for evaluating MPAs.<sup>770</sup> The advocacy position taken by ASOC was supported by topics including climate change,<sup>771</sup> historical significance,<sup>772</sup> intact ecosystem,<sup>773</sup> and eventually, the commercial benefits that attached to the designation of MPAs.<sup>774</sup>

The inclusion of fishing interests in a 2016 background paper recognized the rational use element of conservation under Article II of the Convention. Without recognition of this principle, the capacity of ASOC to influence the Member states resisting consensus was low. While there is no means to draw a causal connection, the movement of the ASOC delegation toward accepting rational use as a legitimate consideration of states was met with the last resisting states joining consensus in 2016, and the introduction of the Ross Sea region MPA conservation measure.<sup>775</sup>

A number of comments from interviewees can be aligned with this perspective on the ineffectiveness of ASOC in moving forward the agenda on MPAs. The low influence ASOC

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<sup>770</sup> CCAMLR-XXVII Meeting of 27 October – 7 November 2008, 'Report of the Twenty-Seventh Meeting of the Commission' (Hobart, Australia, adopted 7 November 2008) [7.14].

<sup>771</sup> ASOC, *The Case for Special Protection of the Ross Sea* CCAMLR-XXVIII/BG/28 (26 September 2009); ASOC, *Climate Change and the Role of CCAMLR* CCAMLR-XXIX/BG/19 (27 September 2010); ASOC, *Key Principles in Designating Marine Protected Areas and Marine Reserves* CCAMLR-XXXII/BG/16 (21 September 2013); ASOC, *AOA Briefing 3: Climate Change and Ocean Acidification: Benefits of Marine Reserves and Marine Protected Areas* CCAMLR-SM-II/BG/07 (12 June 2013); ASOC, *Incorporating climate change into CCAMLR's decision making processes* CCAMLR-XXXIII/BG/21; ASOC, *A representative system of CCAMLR MPAs: Current proposals and beyond* CCAMLR-XXXV/BG/26 (17 September, 2016).

<sup>772</sup> ASOC, *The Ross Sea: A Candidate for Immediate Inclusion in a Network of Marine Protected Areas* CCAMLR-XXVII/BG/30 (October 2008); ASOC, *Protecting the values of Antarctic Specially Managed and Protected Areas* CCAMLR-XXXI/BG/15 (22 September 2012).

<sup>773</sup> ASOC, *The Ross Sea: A Candidate for Immediate Inclusion in a Network of Marine Protected Areas* CCAMLR-XXVII/BG/30 (October 2008); ASOC, *The Case for Special Protection of the Ross Sea* CCAMLR-XXVIII/BG/28 (26 September 2009).

<sup>774</sup> ASOC, *How fishing and marine protection can coexist in the Southern Ocean: An economic analysis of the Ross Sea and East Antarctic MPA proposals* CCAMLR-XXXV/BG/23 (17 September 2016).

<sup>775</sup> *Ross Sea region marine protected area Conservation Measure 91-05* (2016).

had with swaying consensus-resistant nations, notably China and Russia, is indicative of a failure to engage with the nature of the *CAMLR Convention* and the Commission itself – consensus requires addressing all aspects and concerns of the terms of the *CAMLR Convention* as viewed by all parties. One interviewee noted that this was a significant failure specifically on MPAs,<sup>776</sup> while another viewed this failure as symptomatic of NGO engagement.<sup>777</sup>

Another perceived issue was that, generally MPAs were a distraction from the significant regulatory and scientific work of the CAMLR Commission on krill and other Antarctic marine species. By their nature, MPAs promote a whole of ecosystem approach to conservation management. However, significant commentators viewed MPAs as inhibiting the work of the Commission on other matters.<sup>778</sup> As the MPA issue was one championed heavily by ASOC, this can be construed as a criticism of ASOC's participation.

#### 7.4.3 Hybrid NGO: IUCN

The position of IUCN as an international NGO with broad state, NGO, and individual membership places it in a unique position as a body whose decisions represent an international viewpoint on environmental issues. There are qualities of the IUCN that are generally supportive of the object and purpose principles of the *CAMLR Convention*. For example, its decades-long contributions on protected areas means that it set many benchmarks for international designation, regulation, and evaluation of protected areas.<sup>779</sup> Within the CAMLR Commission itself, the IUCN has acted as an observer and

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<sup>776</sup> Interview with Interviewee 18 (1 December 2014).

<sup>777</sup> Interview with Interviewee 11 (2 November 2015).

<sup>778</sup> Interview with Interviewee 5 (28 April 2016); Interview with Interviewee 11 (2 November 2015); Interview with Interviewee 12 (8 December 2014).

<sup>779</sup> Rob Nicoll and Jon C Day, 'Correct application of the IUCN protected area management categories to the CCAMLR Convention Area' (2017) 77 *Marine Policy* 9; for example, the IUCN has a Best Practice Protected Area Guidelines Series: IUCN, *Best Practice Protected Area Guideline Series* (no date) <https://portals.iucn.org/library/taxonomy/term/35899>; National Heritage Trust Australia, *Australian IUCN Reserve Management Principles for Commonwealth Marine Protected Areas* (Australian Antarctic Division, no date); IUCN, *Guidelines for Protected Area Management Categories* (Gland, Switzerland, 1994).

participant at intersessional workshops and meetings. It has recognised the status of the Convention Area as qualifying as a Category IV within the IUCN framework of protection.<sup>780</sup>

The IUCN presented papers in 1997 that suggested the Commission move toward placing MPAs on the agenda,<sup>781</sup> indicating its prescience and influence as an NGO observer within the Commission. The IUCN later supported the work of the Commission toward establishing the Ross Sea MPA through its submission of working papers in 2006 and 2012.<sup>782</sup> These papers reference the principles under which the Commission works – the ecosystem approach, conservation, and scientific research, while recognising the rational use aspect of the Commission’s regulatory jurisdiction.<sup>783</sup> The intersection of object and purpose principles in the CAMLR Commission’s work is clearly recognised in the nature of the advice given by the IUCN. This was demonstrated in the 2012 *Supplement*, in which the best practice standards set by the IUCN demonstrate a clear overlap with the conservation-use principles of the *CAMLR Convention*.<sup>784</sup> Advice from the IUCN recommended: ‘Marine areas that involve extraction need to have defined long-term goals of conservation to be considered MPAs.’<sup>785</sup> This advice makes clear connections to the object and purpose principles of

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<sup>780</sup> IUCN, *Area-based Conservation and Management Measures utilized under CCAMLR* CCAMLR-XXV/BG/18 (19 September 2006).

<sup>781</sup> IUCN, *Report to the World Conservation Union (IUCN) to the CCAMLR* CCAMLR-XVI/BG/37 (27 October 1997) Recommendation 3; IUCN, *Marine Protection in the Southern Ocean* CCAMLR-XVI/BG/40 (20 October 1997).

<sup>782</sup> IUCN, *Area-based Conservation and Management Measures utilized under CCAMLR* CCAMLR-XXV/BG/18 (19 September 2006); IUCN, *A summary of the guidelines for applying the IUCN protected area management categories to Marine Protected Areas (supplementary to the 2008 Guidelines)* CCAMLR-XXXI/BG/18 (22 September 2012).

<sup>783</sup> IUCN, *Area-based Conservation and Management Measures utilized under CCAMLR* CCAMLR-XXV/BG/18 (19 September 2006) 2; IUCN, *A summary of the guidelines for applying the IUCN protected area management categories to Marine Protected Areas (supplementary to the 2008 Guidelines)* CCAMLR-XXXI/BG/18 (22 September 2012) 3.

<sup>784</sup> IUCN, *A summary of the guidelines for applying the IUCN protected area management categories to Marine Protected Areas (supplementary to the 2008 Guidelines)* CCAMLR-XXXI/BG/18 (22 September 2012).

<sup>785</sup> *Ibid*, 3.

the *CAMLR Convention*, referencing use, conservation, and long-term considerations, demonstrating the IUCN's accordance with the object and purpose.

#### 7.4.4 SCAR

The position of SCAR within the ATS provides it with credibility unattainable to most other NGOs. Its purposes are fundamentally aligned with the science principles of both the *Antarctic Treaty* and the *CAMLR Convention*, and it serves no organizational principles beyond providing the best data and scientific advice possible within the context of the ATS and the Antarctic marine and terrestrial ecosystems.<sup>786</sup>

The SCAR observer has been consistently supportive of the object and purpose principle of scientific cooperation. The focus of observer background papers on Antarctic marine life and ecosystems clearly connects to the conservation and ecosystem foci in Article II of the *CAMLR Convention*.<sup>787</sup> The papers do not preclude rational use, although papers do not expressly mention it either. However, as SCAR papers are information-driven, rather than policy-based, this absence is not remarkable, as science-based papers set the parameters of conservation aims by which to then set catch allowances and terms.

The papers submitted by SCAR routinely reflect its intention to support the work of the Commission through knowledge enhancement articulated as scientific cooperation. These are key features of the object and purpose of the *CAMLR Convention* in relation to the *Antarctic Treaty*.<sup>788</sup> The content of SCAR background papers is information-driven, providing points of possible interest in SCAR's work for the CAMLR Commission and Contracting Governments to consider in furtherance of Commission work. SCAR submitted background papers on MPAs to the Commission. These bore directly on MPAs as a biodiversity conservation tool.<sup>789</sup> These papers connect to the broader

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<sup>786</sup> SCAR, *Welcome to the Scientific Committee on Antarctic Research* (2017) <https://www.scar.org/>.

<sup>787</sup> SCAR, *The CAMLR/SCAR-MarBIN Biogeographic Atlas of the Southern Ocean* CCAMLR-XXX/BG/11.

<sup>788</sup> SCAR, *Annual report from SCAR to CCAMLR* CCAMLR-XXVIII/BG/34; SCAR, *Annual report from SCAR to CCAMLR* CCAMLR-XXIX/BG/15; SCAR, *Annual report from SCAR to CCAMLR* CCAMLR-XXX/BG/15.

<sup>789</sup> Secretariat, *Report on the meeting of the International Steering Committee of the SCAR Marine Biodiversity Information Network (SCAR-MarBIN)* SC-CAMLR-XXVI/BG/12;

contributions of SCAR in its database work, and with intersessional engagement, such as the *Antarctic Science* SCAR Symposium outcome.

SCAR's practical contribution to the work of the Commission is through the SCAR-MarBIN, a series of databases that support the work of the CAMLR Commission, its Scientific Committee, its Secretariat, its member states, and its observers. Databases include: A taxonomic Register of Antarctic Marine Species (RAMS); the Antarctic Biodiversity data portal (ANTABIF) –; a Gazetteer of geographical details; a Map catalogue; Antarctic field guides; and complex datasets on species, organised by taxonomy and geography, on population density, catch quantities, reproductive characteristics and other species-based information relevant to conservation and fishing.<sup>790</sup>

The complexity of an ecosystem approach, as required by Article II of the *CAMLR Convention* is clearly supported by the breadth of coverage of species data in the SCAR-MarBIN, from electron microscope databases to population and catch records on fish and cetaceans. SCAR-MarBIN is specifically a set of support tools, providing scientific data and advice for decision makers in the Antarctic.<sup>791</sup> It clearly supports a number of aspects of object and purpose. The breadth of the data, and its accessibility clearly support *CAMLR Convention* principles of scientific cooperation derived from the *Antarctic Treaty*, the ecosystem approach, and the use-conservation intersection of Article II of the Convention.

In respect of MPAs, SCAR demonstrates support of the *CAMLR Convention* object and purpose through the intersection of scientific cooperation, support for conservation objectives, an ecosystem and precautionary approach, and enhancing knowledge for the determination of the ecosystem values. These are clear connections between the work of SCAR and object and purpose principles of the *CAMLR Convention*. These aspects are

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SCAR, *The CAMLR/SCAR-MarBIN Biogeographic Atlas of the Southern Ocean* CCAMLR-XXX/BG/11; SCAR biology symposium (Curitiba, Brazil, 25 to 29 July 2005) *Workshop on marine protected areas* (27 July 2005) WS-MPA-05/13.

<sup>790</sup> Huw J Griffiths, Bruno Danis and Andrew Clarke, 'Quantifying Antarctic marine biodiversity: The SCAR-MarBIN data portal' (2011) 58(1-2) *Deep Sea Research Part II: Topical Studies in Oceanography* 18.

<sup>791</sup> SCAR, *Annual report from SCAR to CCAMLR* CCAMLR-XXX/BG/15, 3.

central to MPAs, as the focus of MPAs is ecosystem preservation of both significant species and areas with unique qualities.

An important limitation of the SCAR-MarBIN is that the commercially-sensitive data generated by the CAMLR Commission is not stored on a SCAR-MarBIN database. This data is retained and protected by the CAMLR Commission to prevent IUU fishers exploiting publicly available commercial data on fishing locations and catch size. This also prevents any intersection of SCAR roles with 'rational use' as a commercial concept, and limits SCAR's contributions to this aspect of the object and purpose to the scientific basis of 'rational use'. However, as noted, the information-focussed nature of SCAR's contributions prevents the absence of 'rational use' being indicative of a failure to address core aspects of the *CAMLR Convention*. The nature of SCAR's contributions simply prevents direct interaction with this aspect of the object and purpose.

SCAR is a good example for the argument that there is a causal connection between the adherence of an NGO to the object and purpose principles of the *CAMLR Convention* and the value with which the Commission treats NGO contributions. SCAR participation and support of the principles of scientific cooperation and objectivity influence the work of the CAMLR Commission.<sup>792</sup> The scientific data also provides the means by which Conservation Measures can be first discussed in the Scientific Committee, indicating the value object and purpose compliant NGOs can bring to Article XXIII roles.

## 7.5 Object and purpose analysis of sanctuary-related NGO roles in the Whaling Commission

NGO submissions to the Whaling Commission can be assessed in terms of their accordance with the object and purpose principles of the *Whaling Convention*. In analysing formal roles, key indicators of accordance with the object and purpose

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<sup>792</sup> SCAR biology symposium (Curitiba, Brazil, 25 to 29 July 2005) *Workshop on marine protected areas* (27 July 2005) WS-MPA-05/13; 'Special Issue: IX SCAR International Biology Symposium. Evolution and Biodiversity in Antarctica' (2007) 19(2) *Antarctic Science*; Keith Reid, 'Monitoring and management in the Antarctic – making the link between science and policy' (2007) 19(2) *Antarctic Science* 267-270; Karl-Hermann Kock, 'Antarctic Marine Living Resources – exploitation and its management in the Southern Ocean' (2007) 19(2) *Antarctic Science* 231-238; Harris et al, 'A new approach to selected Marine Protected Areas (MPAs) in the Southern Ocean (2007) 19(2) *Antarctic Science* 189-194.

require that subject to the primary principles of conservation and rational use, NGO contributions should recognise the purpose of conservation for re-establishing the whaling industry, the interests of consumers, present and future, of whales and whale products, and found position statements on scientific data to support the decision-making of the Commission.

To further the object and purpose of the *Whaling Convention*, NGO engagement on whale sanctuaries should address:

4. the fundamental relationship between **conservation and use**, in which conservation is a mechanism for supporting the development and rehabilitation of whale stocks;
5. that conservation is use-oriented for the purposes of supporting and/or re-establishing the whaling industry for future generations;
6. the **consumers** of whales and whale products; and
7. the centrality of **scientific data** to decisions of the Commission to amend the Schedule.

Due to the large number of environmental NGOs that engaged with the issue of the South Atlantic Sanctuary this section addresses environmental NGOs as a group, highlighting the varying degrees of engagement with the principles of the *Whaling Convention* object and purpose. This allows for a broader coverage than if an organization-by-organization approach was taken, as in 7.4 on NGO engagement with the CAMLR Commission.

#### 7.5.1 Environmental NGOs

Anti-whaling environmental NGOs that pushed for sanctuary designation before 2012 were fundamentally operating without one limb of the object and purpose – scientific evidence. Conversely, pro-whaling environmental NGOs were generally compliant, citing the need to consider science in exercising the Article V mandate for sanctuary designation.<sup>793</sup> This insistence refers back to the terms of the Preamble, with its

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<sup>793</sup> While only the IWMC and GGT made these observations in relation to the South Atlantic Sanctuary: IWMC WCT, *Opening Statement* IWC/55/OS IWMC (2003); GGT, *Opening Statement to the 62<sup>nd</sup> Annual Meeting of the IWC* IWC/62/OS GGT (2010), earlier statements from pro-whaling organizations, both environmental and industrial



concerns for future generations and rebuilding the resource of whale stocks. Specifically, these NGOs cited the *lack* of scientific justification for sanctuaries, indicating an awareness of, and a frustration with, policy and representations that were outside the framework of the *Whaling Convention*.

The South Atlantic Sanctuary proposal in 2016 has been the most recent manifestation of a broad conflict of positions between pro-whaling NGOs intent on representing a use-oriented conservation position and anti-whaling NGOs re-interpreting the regulatory function of the Commission to be for ecotourism with a conservation position that repudiated any lethal use function of the Commission.<sup>794</sup> A significant issue was that in the pre-2016 proposal period, including an initial 2014 proposal, the scientific justification for designation required by Article V was not provided. Rather the *potential* for scientific justification to follow designation was argued as the basis for designation.

#### Science

While the 2014 proposal for a South Atlantic Sanctuary referred to various scientific purposes,<sup>795</sup> the proposal lacked a substantive management plan, and the Scientific Committee requested direction from the Commission on how to proceed with a review

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were in a similar vein: ICFA, *International Coalition of Fisheries Associations statement to the 44<sup>th</sup> meeting of the IWC* IWC/44/OS ICFA (1992); ICFA, *The 46<sup>th</sup> Annual IWC Meeting, Opening Statement of the International Coalition of Fisheries Associations* IWC/46/OS ICFA (1994); GGT, *Opening Statement of Global Guardian Trust* IWC/47/OS GGT (1995); AJSU, *Opening Statement* IWC/49/OS AJSU (1997); International Coalition of Fisheries Associations, *ICFA Opening Statement IWC-53* IWC/53/OS ICFA (2001); International Foundation for the Conservation of Natural Resources, *Opening Statement* IWC/54/OS IFCNR (2002);

<sup>794</sup> ELSA, *Opening Statement to the 45<sup>th</sup> Annual Meeting of the IWC* IWC/45/OS ELSA (1993); Cetacean Society International, *Whale Watching and Whale Conservation* IWC/52/OS/CSI (2000); Florida Caribbean Conservation Coalition, *Opening Statement IWC-53* IWC/53/OS FCCC (2001); ACS, *American Cetacean Society Opening Statement* IWC/54/OS ACS (2002); FCCC, *Opening Statement to the 54<sup>th</sup> meeting of the IWC* IWC/54/OS FCCC (2002); IFAW, *Opening Statement* IWC/54/OS IFAW (2002); WWF, *Opening Statement* IWC/63/OS WWF (2011); WWF, *WWF IWC66 Opening Statement* IWC/66/OS WWF (2016).

<sup>795</sup> *IWC 65<sup>th</sup> Annual Meeting of October 2014, 'Annual Report of the International Whaling Commission 2014 – covering the July 2012 – October 2014 financial year' (Portorož, Slovenia, adopted October 2014)* 12; Argentina, Brazil, South Africa and Uruguay *The South Atlantic: A Sanctuary for Whales* IWC/65/08 (2014).

in the absence of one.<sup>796</sup> The absence of a management plan in the 2014 South Atlantic proposal, and its defeat when voted upon resulted in the South Atlantic proposal in 2016 containing a management plan for the South Atlantic Sanctuary – an attempt to meet the scientific justification criterion of Article V.<sup>797</sup> The Scientific Committee articulated a tacit acceptance of the Sanctuary’s designation as meeting the terms of Article V ‘scientific justification’.<sup>798</sup> This is in accordance with the Committee’s review role.

The WWF took the interesting path of advocating the benefits of a sanctuary on behalf of states who were not party to the *Whaling Convention*.<sup>799</sup> WWF also put forward several arguments that approached the principle of scientific justification through emphasising the importance of the South Atlantic to whale populations.<sup>800</sup> However, there has been no scientific research or resulting evidence that either of the previous sanctuaries – the Indian Ocean Sanctuary or the Southern Ocean Sanctuary has contributed to the conservation or increase of whale stocks. The most relevant research has indicated that area-based restrictions on acoustic noise may increase the lifespans and well-being of marine mammals, including cetaceans.<sup>801</sup> This is significant, but was never cited by NGOs as a reason for designating a whale sanctuary, indicating, a lack of reference to the terms of the convention.

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<sup>796</sup> IWC 65<sup>th</sup> Annual Meeting of October 2014, ‘Annual Report of the International Whaling Commission 2014 – covering the July 2012 – October 2014 financial year’ (Portorož, Slovenia, adopted October 2014) 8.

<sup>797</sup> IWC Scientific Committee, ‘2016 Report of the Scientific Committee’ (2017) 18 *Journal of Cetacean Resource Management (Suppl)* 1, agenda item 19.

<sup>798</sup> IWC Scientific Committee, ‘2016 Report of the Scientific Committee’ (2017) 18 *Journal of Cetacean Resource Management (Suppl)* 1, agenda item 19.

<sup>799</sup> WWF, *WWF IWC66 Opening Statement* IWC/66/OS WWF (2016);

<sup>800</sup> WWF, *Opening Statement* IWC/65/OS WWF (2014); WWF, *WWF IWC66 Opening Statement* IWC/66/OS WWF (2016).

<sup>801</sup> Rob Williams et al., ‘Quiet(er) marine protected areas’ (2015) 100(1) *Marine Pollution Bulletin* 154.

## Conservation

It is clear from Opening Statements that many environmental NGO arguments around conservation lacked reference to the relationship between conservation and the development of the whaling industry for the purposes of lethal use. A critique of the conservation-only position of many environmental NGOs came from pro-whaling environmental NGO, Global Guardian Trust (GGT). In their 2010 Opening Statement GGT referred generally to the impasse that existed in the Commission on the resumption of commercial whaling. GGT wrote that ‘anti-whaling interests *continue to place whales outside of the broadly accepted framework of sustainable use* and [NGOs and states] continue their refusal to compromise.’<sup>802</sup> [emphasis added] This indicates an awareness of the terms of the *Whaling Convention* object and purpose principles on the part of GGT, as well as frustration with the non-engagement with these principles by many NGOs. It also provides a general criticism of the approach of anti-whaling environmental NGOs to interpretation of the convention in advocating the designation of the South Atlantic Sanctuary. The absence of consideration for the framework of the convention in both oral and written statements from anti-whaling environmental NGOs constitutes a failure to consider the scope of the object and purpose of the convention.

Reference to the broader international legal framework for marine mammals was contained in two Opening Statements on the South Atlantic Sanctuary, and one statement to the Commission, from 2010–2016. The first Opening Statement was from ASOC, placing the *Whaling Convention* and its obligations in a web of obligations extending from the United Nations (UN) to the ATS.<sup>803</sup> The second was from Animal Welfare Institute (AWI) placing some members the Whaling Commission under an obligation to declare the South Atlantic Sanctuary due to the 2013 *Montevideo*

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<sup>802</sup> GGT, *Opening Statement to the 62<sup>nd</sup> Annual Meeting of the IWC* IWC/62/OS GGT (2010).

<sup>803</sup> ASOC, *Opening Statement IWC/63/OS* ASOC (2011); it is important to note that the Scientific Committee has endorsed the cooperation of the Commission with other international organizations in management and research in whale sanctuaries: IWC Scientific Committee, ‘2016 Report of the Scientific Committee’ (2017) 18 *Journal of Cetacean Resource Management (Suppl)* 1 [19.2.2.5]. However, this is in addition to extensive inter-organizational cooperation that already exists. ASOC’s proposals *are not new*.

*Declaration*.<sup>804</sup> However, the ATS is not relevant to Whaling Commission jurisdiction,<sup>805</sup> and a General Assembly Declaration generally addressing fishing in the South Atlantic does not bear on the *Whaling Convention*. The reference to Articles 65 and 194 of the *Law of the Sea Convention* from the ICB oral statement similarly refers to the overarching cooperative agreement of members party to the *Law of the Sea Convention*, bypassing the specifics of the *Whaling Convention* itself. Other arguments were that whales needing ‘protection, not persecution’, and the killing of whales in sanctuaries was ‘abhorrent’.<sup>806</sup> References to protection, rather than conservation were common,<sup>807</sup> framing the debate outside the framework of the convention.

Greenpeace expressed a position that disregarded the *Whaling Convention’s* definition of a voting majority, stating that the South Atlantic Sanctuary was an opportunity to ‘demonstrate that the IWC can rise above its differences to agree conservation measures requested by a majority of its members.’<sup>808</sup> This referred not to the necessary three-quarter majority but a majority of some nature. The WWF also took a similar line, supporting the financial interests in conservation of Southern Hemisphere countries as significant to the designation of the South Atlantic Sanctuary, irrespective of those countries’ membership of the Whaling Commission.<sup>809</sup>

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<sup>804</sup> Animal Welfare Institute, *Opening Statement IWC/65/OS AWI* (2014) – note that many of the 24 countries of the ZPCSA are not members of the Whaling Commission; Governments of Argentina, Brazil, Gabon, South Africa and Uruguay, *The South Atlantic: A Sanctuary for Whales IWC/66/08* (2016) 11: referencing the context of the Zone of Peace and Cooperation of the South Atlantic (ZPCSA): *Zone of Peace and co-operation of the South Atlantic*, GA Res 46/19, 46<sup>th</sup> sess, 25 November 1991, UN Doc A/RES/46/19, Preamble and [12].

<sup>805</sup> *CAMLR Convention*, Article VI: ‘Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling...’

<sup>806</sup> AWI, *Opening Statement IWC/63/OS AWI* (2011).

<sup>807</sup> AWI, *Opening Statement IWC/63/OS AWI* (2011); Green Vegans, *Opening Statement IWC/64/OS GV* (2012); Animal Welfare Institute, *Opening Statement IWC/65/OS AWI* (2014).

<sup>808</sup> Greenpeace, *Greenpeace Opening Statement IWC/65/OS Greenpeace* (2014).

<sup>809</sup> WWF, *WWF IWC66 Opening Statement IWC/66/OS WWF* (2016).

## Use

Much of the discussion around use in relation to the South Atlantic bore on the reinterpretation of use of whale stocks for whale watching and ecotourism.<sup>810</sup> This reinterpretation of the *Whaling Convention* is inconsistent both with the fundamentals of treaty interpretation<sup>811</sup> and the consensus work of the Commission on any amendments to the convention.

In 2010, anti-whaling environmental NGOs, the Organización para la Conservación de Cetáceos (OCC), Natural Resources Defense Council (NRDC), and PEW Environment Group (PEW) rejected the possibility of the resumption of whaling. PEW specifically stated they rejected all aspects of use that were being negotiated by the Commission in 2010.<sup>812</sup> The OCC referred to the adoption of the precautionary approach by the Scientific Committee<sup>813</sup> and supported the creation of the South Atlantic Sanctuary in this context, clearly locating the *Whaling Convention* in broader international environmental law. The NRDC presented a viewpoint that it welcomed the South Atlantic Sanctuary proposal and rejected ‘all efforts to strike, restrict, or otherwise impair the management of existing sanctuaries.’<sup>814</sup> A viewpoint repeated in the following years.<sup>815</sup> This demonstrates significant misunderstanding of the conditions and benefits of the existing sanctuaries. It also avoids addressing the fundamental purpose of conservation under the *Whaling Convention*, to re-establish whale stocks for the development of the whaling industry for current and future generations’ use.

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<sup>810</sup> See also [7.3.2].

<sup>811</sup> *Vienna Convention* Preamble, Article 31.

<sup>812</sup> PEW Environment Group, *Opening Statement: PEW Environment Group IWC/62/OS* PEW (2010).

<sup>813</sup> The satisfaction of the precautionary principle by the terms of the Southern Ocean Sanctuary has subsequently been recognised by the Scientific Committee: IWC Scientific Committee, ‘2016 Report of the Scientific Committee’ (2017) 18 *Journal of Cetacean Resource Management (Suppl)* 1 [19.2.2.6].

<sup>814</sup> Natural Resources Defense Council, *Opening Statement IWC/62/OS* NRDC (2010).

<sup>815</sup> Natural Resources Defense Council, *Opening Statement IWC/63/OS* NRDC (2011); NRDC, *Opening Statement IWC/64/OS* NRDC (2012).

## Conclusion

Anti-whaling environmental NGOs generally focussed entirely on conservation as the animating principle for the work of the Commission in relation to sanctuaries, with some reference to scientific data. There are some concerning features of environmental NGO statements on sanctuaries that indicate a general misunderstanding of the nature of the legal framework within which the Whaling Commission operates, with reinterpretations of 'use' outside the parameters of treaty interpretation and Commission practice. There is also an underlying issue with the scientific data aspect of NGO engagement. Until 2012, there was no empirical scientific evidence that marine sanctuaries had any benefit to increasing the size of cetacean species populations.<sup>816</sup> In short, there was a dearth of scientific evidence to justify sanctuaries as a recommended tool for cetacean management.<sup>817</sup> The value of environmental NGO engagement with the Commission is undermined by the misunderstanding of the *Whaling Convention* and the absence of scientific evidence.

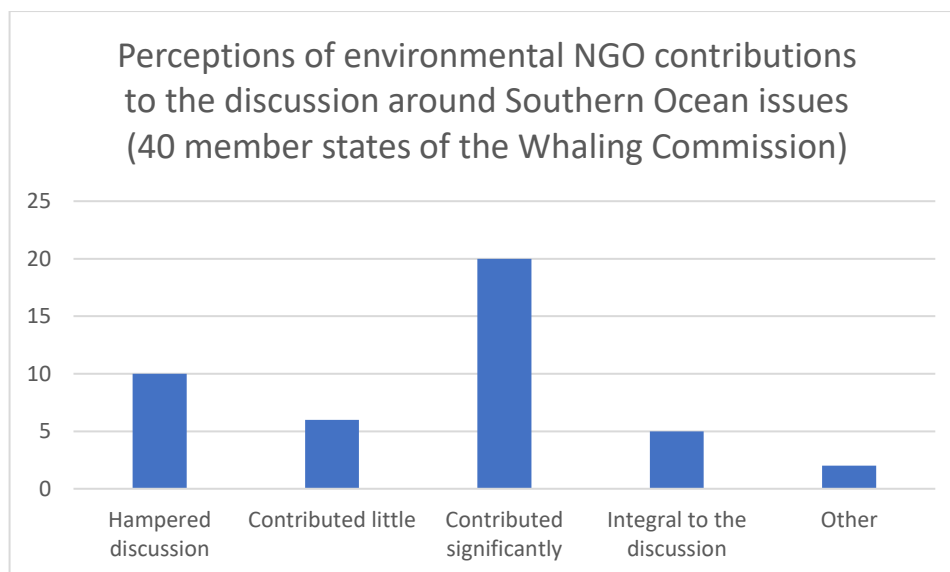
### 7.5.2 Member state and stakeholder views on NGO participation in sanctuary designation

As with surveys in the CAMLR Commission, the views of Whaling Commission member states on environmental NGOs are varied, indicating that the subjective evaluation of environmental NGO contributions lacks a common reference point. On the Southern Ocean, states were divided, with 25 respondent states viewing environmental NGO contributions positively, but 15 states viewed NGO contributions as minimal or limiting Commission discussion. Two state respondents used the opportunity to highlight the limited opportunity for NGOs to contribute.

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<sup>816</sup> Andrew M Gormley et al., 'First evidence that marine protected areas can work for marine mammals' (2012) 49 *Journal of Applied Ecology* 474. One journal article noted that mega-fauna might be useful but stated that conservation initiatives 'had little ecological basis and are driven by public affection toward charismatic species': Hooker and Gerber, above n 680.

<sup>817</sup> Gormley et al, above n 816.



*Figure 7.2 Perception of environmental NGO contributions to Southern Ocean discussions*

As with the CAMLR Commission, the views of states were divided enough to demonstrate that the value-assessment of NGO contributions are too subjective and partisan for constructive evaluation. Similarly, interviewees were divided in their views, and expressed partiality.<sup>818</sup> While there were negative views from each side of the pro-whaling and anti-whaling divide toward the other side, there were general positive views of their own contributions from both sides.

The Executive Secretary expressed a clear appreciation for the expertise that NGOs brought to the Commission.<sup>819</sup> This was a view seconded by a Commissioner of long standing.<sup>820</sup> While these were valuable insights into Commission and NGO contributions, these are not objective measures. Evaluating adherence to the object and purpose provides an objective measure that ensures a level of accountability on engagement with the rule of law in the Commission.

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<sup>818</sup> Interview with Interviewee 16 (16 September 2014); Interview with Interviewee 13+14 (12 September 2014); Interview with Interviewee 10 (18 September 2014); Interview with Interviewee 9 (17 September 2014); Interview with Interviewee 8 (18 September 2014); Interview with Interviewee 3 (17 September 2014); Interview with Interviewee 2 (16 September 2014).

<sup>819</sup> Interview with Interviewee 1 (21 October 2014).

<sup>820</sup> Interview with Interviewee 15 (26 October 2016).

### 7.5.3 Hybrid NGOs

Across the history of whale sanctuaries, the IUCN has largely engaged with the terms of the object and purpose of the *Whaling Convention*. For example, as early as 1983, the IUCN recognised sanctuaries as an ‘additional safeguard against overexploitation’<sup>821</sup> and discussed whale stocks in terms of ‘stock management’, and in 1990 used terms associated with regulation of commercial whaling.<sup>822</sup> IUCN engagement with the South Atlantic Sanctuary was minimal. It pledged its support for the sanctuary through the provision of expertise for implementation and regulatory evolution, indicating deference to the primary position of the Commission in decision-making, and its own position as a supporting organization.<sup>823</sup> However, the connections between the IUCN oral statement in 2014 and the resolution of its WCC make clear that it is also beginning to marginalise the lethal use aspect of the *Whaling Convention* in favour of a broad re-interpretation of use for non-lethal purposes. However, the discussion of the sanctuary could also be construed as focusing on temporally relevant questions of conservation rather than hypothetical future use. The IUCN is clearly concerned with proper management of whale sanctuaries<sup>824</sup> and therefore with a scientific basis for the sanctuary.

The position of the IUCN in relation to the South Atlantic Sanctuary shows an awareness of the object and purpose principles, and a general compliance with those principles. However, it does not engage with the implications of sanctuaries for use-oriented conservation, avoiding addressing the interdependence of conservation, use and future use. To this end, the IUCN contributions refrain from engaging with the complicated issue of where sanctuaries sit in relation to object and purpose principles, and considering its pledge of support, defers consideration of object and purpose principles to the Commission. This supports its Article IV position, despite avoiding the question of use.

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<sup>821</sup> IUCN, *Statement to the 35<sup>th</sup> Annual Meeting of the IWC* IWC/35/OS/IUCN (1983).

<sup>822</sup> IUCN, *Statement to International Whaling Commission* IWC/42/OS/IUCN (1990).

<sup>823</sup> IUCN, *Statement*, IWC/66/OS IUCN (2016).

<sup>824</sup> *Ibid.*



As noted, the IWMC WCT was concerned to emphasise the importance of scientific data to decision-making in the Commission. Once the Scientific Committee had indicated there were sufficiently clear management guidelines in place, the IWMC WCT withdrew commenting, bowing to the clear exercise of the scientific data aspect of the *Whaling Convention* object and purpose.<sup>825</sup>

#### 7.5.4 Industry NGOs

While there was engagement by industry NGOs with the Southern Ocean Sanctuary proposals, there was no engagement on the issue of the South Atlantic Sanctuary. Looking overall at responses to sanctuary designation, the position of industry NGOs stressed the significance of scientific justification having not been met;<sup>826</sup> a counterpoint to arguments from anti-whaling NGOs that sanctuaries were by their nature beneficial and scientifically sound. For example, the industry NGO, the International Coalition of Fisheries Associations (ICFA) consistently objected to the Southern Ocean Sanctuary designation on the basis that there had been no proper review of the proposed sanctuary by the Scientific Committee.<sup>827</sup> ICFA also referenced the rule of law; stating that

*To remain a credible international management organization, the IWC must recognize the legitimacy of resource utilization and the steps to return to the principles underlying the Convention.*<sup>828</sup>

This raises a key issue with an international organization being encouraged to ignore its legal mandate by NGOs. This issue is as relevant to the South Atlantic Sanctuary as it was to the Southern Ocean proposals. If states become party to an international

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<sup>825</sup> IWMC, *IWC: A System of Loopholes* IWC/56/OS IWMC (2004); IWMC, *Statement in Plenary discussion on Agenda Item 5.1* above n 720.

<sup>826</sup> JWA, *Opening Statement by the Japan Whaling Association* IWC/47/OS JWA (1995); Riches of the Sea, *Opening Statement of the Riches of the Sea* IWC/47/OS RS (1995).

<sup>827</sup> ICFA, *International Coalition of Fisheries Associations statement to the 44<sup>th</sup> meeting of the IWC* IWC/44/OS ICFA (1992); International Coalition of Fisheries Associations, *The 45<sup>th</sup> Annual IWC Meeting: Opening Statement of the ICFA* IWC/45/OS ICFA (1993); ICFA, *The 46<sup>th</sup> Annual IWC Meeting, Opening Statement of the International Coalition of Fisheries Associations* IWC/46/OS ICFA (1994); International Coalition of Fisheries Associations, *ICFA Opening Statement* IWC-53 IWC/53/OS ICFA (2001).

<sup>828</sup> ICFA, *Opening Statement to the 44<sup>th</sup> meeting of the IWC* IWC/44/OS ICFA (1992).

organization, those states should act in accordance with the terms of that organization's treaty. A failure to recognise the principles of the *Whaling Convention* is a failure to act in accordance with the rule of law. The conservation of whales for the sake of whales themselves may be ethical, meritorious, and even right. But to disregard the rule of law in the process of doing so weakens the capacity of the Commission to function under its own jurisdiction.

## 7.6 Conclusions

### 7.6.1 CAMLR Commission

The most effective way for NGOs to contribute to the work of the CAMLR Commission is through collaborative engagement with the Commission. The significant collaborations of the scientific NGO SCAR with the CAMLR Commission through the SCAR-MarBin illustrated this. SCAR roles were largely restricted to addressing the scientific evidence and data requirements of the *CAMLR Convention* object and purpose, and in facilitating the connections between the Commission and the ATS. This ensured contributions were objective and geared toward support of the work of the Commission, allowing the Commission to decide the balance of Article II 'conservation includes rational use' without political representations from SCAR. This is contrasted with the contributions of the environmental NGO, ASOC. ASOC provided many useful contributions. The overemphasis on conservation undermined the value of the work of ASOC from an objective perspective as it failed to address the object and purpose. Industry NGOs were absent from the dialogue on MPAs, as it was outside their sphere of concern.

### 7.6.2 Whaling Commission

There was a clear difference among environmental NGOs, hybrid NGOs, and industry NGOs in furthering the work of the Whaling Commission in accordance with its object and purpose mandate under the *Whaling Convention*. The IUCN supported the work of the Commission and recognised the ongoing relevance of use and conservation as well as future use aspects of the object and purpose. Its statements leaned heavily toward conservation from a precautionary approach perspective, advocating for sanctuaries on the basis of a precaution against overexploitation when commercial whaling resumed. It

also offered its own scientific expertise.<sup>829</sup> However, much as with environmental NGOs, science-based advocacy was limited.

Among environmental NGOs conservation was termed ‘protection’ arguably conceptually similar to ‘preservation’ and utterly removed from the potential for current or future use. Scientific justification was also noticeably absent. Many position statements focussed on reasons for sanctuaries that were unrelated to the principles guiding the work of the Commission, including the benefits of sanctuaries to non-member states in the region of the proposed sanctuaries. There were also unsupported claims of the scientifically-evidenced value of designating sanctuaries when literature demonstrates only recent confirmations of the hypothesis that sanctuaries increased stock sizes and lengthened life spans among cetaceans. The arguments of sanctuaries being the basis for increased scientific engagement has not been borne out, with the Southern Ocean Sanctuary and Indian Ocean Sanctuary having provided no indications that sanctuaries contribute to cetacean conservation.

The primary arguments in relation to conservation and the designation of the sanctuaries and others were along interpretative lines with indications of a push for reinterpretation of the *Whaling Convention*, with the WWF arguing ‘the IWC actually has greater and more socially constructive task than merely the regulation of whaling by setting quotas.’<sup>830</sup> While it is accurate to say that the Whaling Commission has a more constructive task than simply setting quotas – Article V grants extensive conservation and use regulatory powers, the regulation of whaling remains a fundamental principle of the Convention and therefore the work of the Commission.

#### 7.6.3 Significance of findings

For the CAMLR and Whaling Commissions, the importance of their respective conventions lies in the proper construction of their terms according to the literal meaning of those words, in light of the object and purpose. To varying degrees, NGOs demonstrate awareness of, and accordance with the legal mandate of the Commission with which they engage. This case on protected areas demonstrates that the extent to

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<sup>829</sup> IUCN, *Statement*, IWC/66/OS IUCN (2016).

<sup>830</sup> WWF, *WWF Statement to the 35<sup>th</sup> annual meeting of the IWC 18-23 July, Brighton, U.K.* IWC/35/OS-WWF (1983).

which NGOs aim toward supporting a Commission in its work in light of the object and purpose, will be determined by the inclination of the contributing NGO. This position is untenable, in that NGOs may actively work to undermine the object and purpose principles guiding the work of a Commission, yet no correction is undertaken of the methods by which this damage is done.

As will be discussed in Chapter 8, there is a clear need for the redrafting of the *Whaling Commission Rules of Procedure* to ensure stricter adherence to the principles of the *Whaling Convention*. In both Commissions, editorial directives on the considerations that should underpin information papers and oral interventions should be made available to NGO observers. The Secretariat should be charged with ensuring compliance among NGOs in the content of their papers and statements.

The Whaling Commission in particular has been charged with dysfunctionality ever since the institution of the commercial whaling moratorium.<sup>831</sup> A return to the consideration of fundamental object and purpose principles and the terms of the *Whaling Convention* for regulation will be a significant step toward genuine dialogue.

In the next chapter, the discussions of chapters five, six and seven will be brought together to make several recommendations for reform of both Commissions' *Rules of Procedure* and *Rules of Debate* as well as the admission procedures for the Whaling Commission to ensure sufficient scrutiny of the position of NGOs seeking observer status to facilitate constructive contributions to the work of the Commission.

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<sup>831</sup> Gillespie, above n 263, 7; *Resolution on the extension of Small Working group on the Future of the IWC until the 62<sup>nd</sup> Annual Meeting of the Commission 2009-1*, IWC/61/10 amended; *Progress Report on the September 2008 meeting of the Small Working Group (SWG) on the Future of the International Whaling Commission presented by Alvaro de Soto, SWG Chairman, St Petersburg, Florida, USA* IWC/S08/Rep 1; *An overview of the elements/issues identified as being of importance to one or more Contracting Governments in relation to the future of the IWC* IWC/S08/SWG 3.

## Chapter 8: Conclusion

### 8.1 Introduction

NGO influence has a significant capacity to impact on state behaviours. While literature has focussed on how NGOs contribute to state and international organization decision-making, there is no literature on the accountability of NGO engagement in accordance with treaties. So far, this thesis has addressed the question of whether NGO behaviours support the object and purpose of the CAMLR Commission and Whaling Commission under the respective Commission's treaty. In Chapter Two, the objects and purposes of the *CAMLR Convention* and *Whaling Convention* were identified. Each convention's object and purpose principles had sufficient commonalities to present the broad categories of use, conservation, future generations' interest, and scientific bases for decision-making. In Chapter Three, the history, jurisdiction, substantive powers, membership and voting rules of the two conventions were explained, with reference to the object and purpose. Chapter Four went on to contextualise NGO behaviours in terms of broader international environmental law and proposed a clear and legal definition for 'NGO', as well as 'types' of NGO according to their purpose. This chapter explored NGO roles in the Commissions under the conventions, defining the nature and extent of the formal and informal roles available to NGOs as observers in light of the object and purpose. It also described unsanctioned NGO behaviours in relation to the two Commissions.

In Chapters Five, Six and Seven, NGO behaviours were described and evaluated through an object and purpose analysis framework. Chapter Five considered NGO behaviours from their first attendance at Commission meetings, 1963 in the Whaling Commission, 1982 in the CAMLR Commission, through to 2016 in the Whaling Commission and 2017 in the CAMLR Commission. Chapters Six and Seven provided case studies of NGO engagement in fisheries regulation and enforcement, and protected areas. These chapters established that NGO support for the object and purpose of the *CAMLR Convention* and the *Whaling Convention* varies across NGO type, and that without sufficient adherence to object and purpose principles, NGO contributions can be rendered ineffective due to insufficient focus on the legal framework of the convention.

This chapter completes the analysis of NGO conduct by asking whether NGO conduct *should* be referable to or accountable to the object and purpose of the treaty with whose Commission they are engaging. Two key arguments are advanced. First, compliance with the object and purpose supports the rule of law. Second, it ensures support for the work of the two Commissions. This argument is founded in support for the rule of law in international forums, but also to reflect the potential power and influence NGOs can exert in international diplomacy. In order to act with reference to the rule of law, NGOs should comply with convention object and purpose principles, despite not being parties to international agreements.

Part 8.2 summarises the nature of NGO behaviours in the CAMLR and Whaling Commissions analyzed in the preceding three chapters. It demonstrates that NGO behaviours in the Commissions fit within the broader literature on NGO behaviours and influence in international law and decision-making. Part 8.2 also considers other factors that may contribute to dysfunctional behaviour in Commissions, aside from negative impacts from NGO influence.

Part 8.3 engages with the question of whether NGOs should support the object and purpose. It asks whether NGO conduct *should* be referable or accountable to object and purpose-based expectations, and if so, how that would be done. It refers to the findings of Chapters Five to Seven to support an argument that NGO behaviours and roles should be subject to control and evaluation with reference to the object and purpose to ensure support for the work of the two Commission. This argument is founded in fundamental support for the rule of law in international forums, and the need to avoid political disruption under the guise of democratic participation. Part 8.4 proposes changes to the *Rules of Procedure* in both Commissions to facilitate clearer NGO engagement with the object and purpose to support the work of each Commission.

## 8.2 NGO behaviours in the CAMLR Commission and Whaling Commission

Chapter Five explored how the admissions process define the Commission expectations of NGO consideration of the object and purpose principles as well as the subordinate nature of the non-state position in engaging with the Commission. Observations applied to all NGO types, but often more particularly to environmental NGOs. The *CAMLR Convention* stipulates at Article XXIII that non-state engagement should support the

work of the Commission. Similarly, Article IV of the *Whaling Convention* provides for a supportive role for non-state actors. It also confined contributions to those delegated to actors by the Commission, and IV.3 indicated that non-state roles were confined to contributing information on whale stocks.

In the CAMLR Commission, the increase in observer delegation numbers, particularly with the ASOC delegation, but also the industry NGOs, ARK and COLTO, was clearly connected to the lack of enforcement by the Secretariat or the Commission of earlier decisions of the Commission to restrict observer numbers per organization to a single attendee. It was also partially a result of there being no number restrictions in the *CAMLR Commission Rules of Procedure*.

In the Whaling Commission, clear connections between NGO behaviours and amendments to the *Whaling Commission Rules of Procedure* and Secretariat became evident when trends in NGO attendance were analyzed against years in which rules were amended. This indicated that NGO behaviour is susceptible to alteration where the Commission has a will to amend its rules and processes. The application process also highlighted that NGO observer accreditation did not require NGOs to demonstrate an understanding of, or organizational concern for the object and purpose principles underlying the Commission's work. This was in contrast to the CAMLR Commission.

In the Whaling Commission, the content of Opening Statements and the use of speaking rights illustrated that the absence of expectations of accord with the object and purpose in the application process led to contributions that often failed to support the principles underlying Commission decision-making. Methods of addressing disruptive NGO observer behaviours were also indirect, such as changing Opening Statements from oral presentations to documentary, or simply ignoring NGO breaches of the *Rules of Debate* and *Rules of Procedure*.

In the CAMLR Commission, the content of Information Papers and use of speaking rights indicated that there were connections between the admissions process requirements to demonstrate support for the object and purpose principles and content. This was further supported by the direct engagement by Commission members in disciplining NGO observers that strayed from the supportive and object and purpose-considered position expected of subordinate actors.

Chapter Five presented both the possibility of change, and the likelihood of successful confinement of NGO behaviours to supportive engagement where admissions processes, and rules were directed toward maintaining the distinction between subordinate non-state actor roles and the decision-making position of member states.

Chapter Six engaged with the use-based issue of catch regulation and enforcement in the Commissions and provided an object and purpose analysis of NGO observer roles and intersessional enforcement behaviours of NGOs. Being a use-based issue, the balance to be struck between conservation and use was a consistent aspect of decision-making, and NGOs were in a position to make significant contributions to the balance being conservation-oriented. NGOs were largely successful in both Commissions.

This chapter looked particularly at sessional behaviours of accredited observers and several incidents in the Southern Ocean in the intersessional periods. These were the incidents in the 2014/15 Austral summer involving the IUU vessel the *MV Thunder* and Sea Shepherd and COLTO vessels, and the ongoing Sea Shepherd campaign to prevent JARPA II vessels from performing scientific whaling in the Southern Ocean.

This chapter found that behaviours of all NGO types in the CAMLR Commission were generally reflective of object and purpose principles, including Sea Shepherd in the intersessional period. The industry NGO COLTO was better placed to provide stock and catch data, resources and practical assistance to the Commission because of its members being active and financially invested in the legal commercial fishing of toothfish. The IUCN and ASOC both provided policy-based assistance in developing the extensive conservation measures in place to combat IUU fishing, in line with the object and purpose principles. An exception was early in ASOC's engagement when the written and oral submissions pushed a conservation line that undermined both the decision-making of the Commission and the principles of the object and purpose by rejecting rational use.

In relation to the Whaling Commission, anti-whaling environmental NGO observers tended to present a diversity of views, many of them not addressing the object and purpose. Some NGO Opening Statements addressed tangible issues of the scientific value of the JARPA II programs, with reference to the *Whaling Convention* and its object and purpose expectations of sound scientific evidence in decision-making. However, other environmental NGO observers failed to address the object and purpose, and



simply made statements of position. This applied to all environmental NGOs, anti- and pro-whaling. Emotive argument was the dominant theme observable among protesters at Commission meetings in 2014 and 2016, where words such as ‘murder’ were used in reference to JARPA II programs. By contrast, the IUCN consistently submitted Opening Statements that showed consideration of the object and purpose, particularly highlighting the importance of connecting scientific whaling to the purposes of stock rehabilitation for future use.

Ultimately, the *Whaling Case* decision bore out the position of opposition. To this extent, the ICJ validated the science-based arguments of NGOs as well as the enforcement of activities of Sea Shepherd. Nonetheless, without articulated understanding of the relevance of the object and purpose principles to the work of the Commission, many environmental NGOs failed to support the decision-making of the Commission.

In contrast to the use-based issue of catch regulation and enforcement, protected areas are a conservation issue. There are interdependencies between the two concepts in both the *CAMLR Convention* and the *Whaling Convention* – the *CAMLR Convention* stating that conservation includes rational use, and the *Whaling Convention* highlighting that ‘the proper conservation of whale stocks’ is integral to the ‘orderly development of the whaling industry’.

In Commission deliberations around designation of the Ross Sea MPA there was scope in the CAMLR Commission for the contributions of environmental, hybrid and scientific NGOs. In the Whaling Commission the dominant contributors continued to be environmental NGOs and the hybrid, IUCN.

Contributions from ASOC in the CAMLR Commission were primarily focussed on advocacy for conservation without recognising the rational use aspect of conservation under Article II. In 2016, the year in which the Ross Sea MPA was successfully designated, ASOC submissions finally acknowledged the consideration of rational use in Commission decision-making for designation. By contrast, SCAR deferred consideration of object and purpose principles to the decision-making of the Commission by providing raw data in place of advocacy. The IUCN contributed its own work on the designation of protected areas as a means of guiding the Commission’s decision-making. It also ensured that all principles of the object and purpose were addressed in submissions and statements.

The Whaling Commission deliberations on the South Atlantic Whale Sanctuary from 2010-2016 saw a variety of engagement from environmental NGOs, including collaboration with member states to host an event in support of the 2016 designation proposal, the submission of Opening Statements, and the use of speaking rights. The support event for the South Atlantic Sanctuary relied on political agitation and the use of branded items to promote the sanctuary, such as note paper, pens, ribbons, USB drives and folders. There was no engagement with the object and purpose. This approach was consistent with the content of oral and written statements of anti-whaling environmental NGOs, with frequent reinterpretation of the *Whaling Convention* to cover non-lethal use of whales, as opposed to its clear lethal intentions. The IUCN also placed the designation of the sanctuary outside the scope of the convention, albeit by avoiding the question of rational use. Within its own WCC resolution on the South Atlantic Sanctuary, emphasis was placed, not on the *Whaling Convention* but on familiar themes from environmental NGOs of whale watching and coastal community economies.

Chapter Seven also engaged with data obtained from surveys administered to member state delegates in the CAMLR Commission and Whaling Commission. The data demonstrated that there was no consistency among delegates in their view of NGO contributions to the designation of protected areas. This in itself highlighted the need for an objective reference point, such as the object and purpose, by which to measure NGO engagement.

These chapters established the background necessary to consider how *Whaling Commission Rules of Procedure, Rules of Debate* and Commission or Secretariat admission procedures can affect NGO behaviour to ensure consideration of the fundamental principles animating the work of both Commissions. The following section engages with this consideration and presents some possible amendments to both procedures and *Rules*.

### 8.3 Object and purpose principles to promote the rule of law

NGO behaviour can have significant influence on decision-making. Chapters Six and Seven illustrated that NGO behaviours can contribute or detract from Commission decision-making, and there is a need to consider these behaviours in terms of regulation

or accountability. The value of using an object and purpose principles reference point is clear. In the CAMLR Commission, where the *CAMLR Convention* and the *Rules of Procedure* have standards of engagement requiring observer NGO engagement to consider the principles under which the Commission works, effective contributions from NGOs are the standard across NGO types, with minor deviation from environmental NGO, ASOC. The Whaling Commission does not find a parallel insistence on supportive engagement in the *Whaling Commission Rules of Procedure*, which do not reflect the nature of the *Whaling Convention*. It is possible that a greater emphasis on object and purpose principles may improve the nature of NGO contributions in the Whaling Commission.

This part explores the possibility of using object and principles to regulate NGO behaviour to improve accountability of NGOs to the Commissions within which they act. Before doing so, the risks of object and purpose principles being used as a tool of regulation or accountability, need to be explored. Any move to regulate NGO conduct must take account of the importance of NGOs in providing a means for domestic audiences to access international decision-making. This function of NGOs promotes democratic principles, it engages a global population in decisions that impact on a global level. To restrict this important function could be inimical to participatory democracy. NGOs also provide funding, expertise, resources, and access for international institutions to networks of individuals and groups concerned with the work of that institution. These allow the work of international institutions to run more smoothly, and for such efforts to connect to pre-existing networks and bodies addressing similar issues. These are all valuable contributions and should not be undermined.

However, NGO roles may be misused. Misrepresentations made by NGOs to a global audience can make complex issues more complex. There are also questions of how NGO support, be it financial or resource-based, may be used as a means of forwarding a political agenda that does not support the legal mandate of an international body. In relation to whaling, there are clear indications of a cultural imperialism among anti-whaling environmental NGOs that dismisses minority viewpoints in favour of culturally

presumptive ideals, that have arisen outside of, and unconnected to cultures that value or need whale meat.<sup>832</sup>

The stalemate observable within the Whaling Commission on the subject of resuming scientifically determined sustainable whaling is a strong argument for the need to develop a reference point for accountability and transparency. An objective standard could also be a possible means of addressing multiple negative impacts by having a reference point and touchstone for dialogue. It would be fair for this reference point to affect all international actors – states and non-states alike, and so the object and purpose is ideally situated for this purpose. It also has the benefit of supporting the rule of law.<sup>833</sup> This part tests the proposition that Commissions should regulate sessional NGO contributions according to the terms of the treaty. This ensures transparency around the meaning of the jurisdiction under the treaty and emphasises a legal mandate to support the rule of law. This part also tests whether this proposition would be a valuable tool for Commission discussion of intersessional NGO behaviours. Chapters 5 – 7 have explored whether NGO behaviours adhere to object and purpose principles, and in making observations of NGO conduct, the value of conduct, relative to the object and purpose, can be assessed by a clear standard.

There are practical and philosophical reasons that may justify an object and purpose regulatory approach. As has been mentioned, the rule of law is a fundamental aspect of

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<sup>832</sup> Jennifer Marohasy, 'Imposing our preferences on whaling cultures' (2008) *IPA Review* 39; Amy L Catalinac and Gerald Chan, 'Japan, the West, and the whaling issue: understanding the Japanese side' (2005) 17(1) *Japan Forum* 133; Benedict E Singleton, 'Clumsiness and elegance in environmental management: applying cultural theory to the history of whaling' (2015) 25(3) *Environmental Politics* 414.

<sup>833</sup> *The rule of law at the national and international levels*, GA Res 64/116 UN GAOR, 6<sup>th</sup> Comm, 64<sup>th</sup> sess, Agenda Item 83, UN Doc A/RES/64/116 (16 December 2009); *The rule of law at the national and international levels*, GA Res 66/102 UNGAOR, 6<sup>th</sup> Comm, 66<sup>th</sup> sess, Agenda item 83, UN Doc A/RES/66/102 (6 December 2011) ; *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, GA Res 67/1 UN GAOR, Main Comm, 67<sup>th</sup> sess, Agenda Item 83, UN Doc A/RES/67/1 (24 September 2012); David P Fidler, 'Introduction: The Rule of Law in the Era of Globalization' (1998-1999) 6 *Indiana Journal of Global Legal Studies* 421; Kenneth J Keith, 'John Dugard Lecture – 2015: The International Rule of Law' (2015) 28 *Leiden Journal of International Law* 403.

international order.<sup>834</sup> While there are significant issues with the interplay of political power and the international legal regimes, these issues are not a reason to set aside the aspiration to develop greater adherence to the rule of law. A second point is that in terms of the two Commission specifically, there is a problem with the philosophical position of some NGOs that advocate for animal welfare in such a way that it displaces the welfare of humans and human interest as a legitimate focus of the conventions.

In terms of practical considerations, there are clear benefits to emphasising the object and purpose of a treaty as a reference point for NGO engagement, if not all engagement. Consider, for example, a position that arose in the Whaling Commission in the 2018 meeting in Florianópolis, Brazil. The Buenos Aires Group, a bloc of Latin American countries working closely with various NGOs,<sup>835</sup> put forward a Declaration that significantly reinterpreted the object and purpose principles of the *Whaling Convention*, excluding the core meaning of ‘whaling’ as a lethal, use-based activity.<sup>836</sup> This position clearly diverges from the fundamentals of the *Whaling Convention*. It fails to adhere to elementary rules of treaty interpretation and creates a highly politicised atmosphere in what should be a Commission that focuses on the rule of law and decision-making within the confines of its jurisdiction.

NGO engagement and the rules around that engagement are not the cause of the issue here – the open membership rules and the simple majority voting, allow for this partisan development. However, there is a clear relationship of influence, observable at meetings, and the subversion of the object and purpose principles, while not attributable directly to NGOs, can be traced in part to their influence. An articulation of object and purpose expectations on NGOs would, at the very least, emphasise the issue of putting forward a political position in order to twist a legal mandate.

The strength of the *CAMLR Convention* is that with the combination of consensus voting, clear expectations for object and purpose principle consideration among NGO observers, and a selective membership process, there is a necessary emphasis on the

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<sup>834</sup> *Ibid.*

<sup>835</sup> See discussion at [7.3.2] and [7.5.1].

<sup>836</sup> *Draft Resolution. The Florianópolis Declaration on the Role of the International Whaling Commission in the Conservation and Management of Whales in the 21<sup>st</sup> Century IWC/67/13.Rev 1* (plenary agenda item 12).

fundamental question of *how* to support the Commission in its work. A comparison of the *Rules of Procedure* for both Commissions demonstrates the absence of communicated expectation to NGO observers in the Whaling Commission, and this raises the question of whether alteration may improve Commission functionality.

The *CAMLR Commission Rules of Procedure* on observer participation operate in conjunction with Articles XII and XXIII of the *CAMLR Convention*. Rule 30 provides that subject to Article XII of the Convention the Commission may invite observers to attend Commission meetings. This reference to Article XII requires the Commission to consider observer invitations in light of the fundamental work it undertakes in terms of the researching, developing and implementing conservation measures and other practical aspects of its work. Similarly, Article XXIII of the Convention, the foundation of NGO and observer engagement, predicates observer engagement on the proviso that such engagement arises from ‘co-operative working relationships’. These words indicate that expectations on observers are co-operative and subject to the benefit of contributions proffered by observers to the work of the Commission. The expectations on observers in relation to the submission of documents for Commission consideration also highlights that such documents ‘shall be relevant to matters under consideration in the Commission’.

While these terms do not explicitly require consideration of object and purpose principles, the language of the *Rules* and the *CAMLR Convention* turn both the Commission and observers to consideration of the work of the Commission, which is itself guided by object and purpose principles. The constant and clear reference to the work of the Commission is also significant, because it restricts the potential focus of NGOs to the matters directly under consideration by the Commission, and not to matters an observer NGO may deem to be of interest to the Commission.

The *Whaling Commission Rules of Procedure* provide a contrast on all points. However, the *Whaling Convention* does not. Article IV of the *Whaling Convention*, like the *CAMLR Convention* delineates clear expectations of contributions that bear on the work of the Commission. Article IV defines the nature of relationship between the Commission and ‘public or private agencies’ as collaborative or delegated, and restricted to developing the knowledge base around whales, whale stocks, and stock rehabilitation. The *Whaling Commission Rules of Procedure* do not reflect these considerations.

To seek admission as an observer, NGOs and others must simply ‘express an interest in matters covered by the Convention’ and there is no mention of the *Whaling Convention* Article IV as a defining reference point for engagement. This contrasts with the CAMLR Commission *Rules*, which highlight the interconnection between Article XXIII and admission. Further, the Whaling Commission *Rules* do not require ongoing consideration by the Commission of the appropriateness of an invitation, instead allowing accreditation to stand, once obtained. The CAMLR Commission *Rules* make no such provision, and in doing so expects ongoing consideration by the Commission of the appropriateness of each year’s observer invitations.

While these are only two case studies, there are lessons to be learned from both their failures and successes for other RFBs and treaty bodies. The Commission for the Conservation of Southern Bluefin Tuna (CCSBT),<sup>837</sup> the International Commission for the Conservation of Atlantic Tunas (ICCAT),<sup>838</sup> the North Atlantic Marine Mammal Commission (NAMMCO),<sup>839</sup> and the Western & Central Pacific Fisheries Commission (WCPFC)<sup>840</sup> are RFBs that engage with NGOs through observer status and could benefit

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<sup>837</sup> CCSBT, *Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna* (October 2018) [https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs\\_english/basic\\_documents/rules\\_of\\_procedure\\_of\\_the\\_commission.pdf](https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs_english/basic_documents/rules_of_procedure_of_the_commission.pdf). The Rules of the CCSBT are quite clear in expecting NGO observer applicants to demonstrate ‘competence concerning southern bluefin tuna or the organisation’s competence to contribute to the attainment of the objectives of the Convention.’

<sup>838</sup> ICCAT, *Guidelines and Criteria for Granting Observer Status at ICCAT Meetings* MISC/05-12 (2005) <https://www.iccat.int/Documents/Meetings/Observer%20Guidelines%20EN.pdf>. The Rules of the ICCAT also expect NGO observer applicants to communicate ‘aims and purposes of the organization and an indication as to how they relate to the objectives of ICCAT’.

<sup>839</sup> NAMMCO, *Procedures & Rules for Observers Attending NAMMCO Meetings* (Adopted at NAMMCO, 24 February 2016) NAMMCO/24/22 [https://nammco.no/wp-content/uploads/2017/09/nammco\\_guidelines-observers-2016\\_list\\_obs\\_feb2018.pdf](https://nammco.no/wp-content/uploads/2017/09/nammco_guidelines-observers-2016_list_obs_feb2018.pdf). The NAMMCO Procedures do not mention the criteria by which observer applicants are judged or set out criteria to guide the content of observer rights and privileges. This demonstrates both a lack of transparency in decision-making of the Commission and an absence of requirement to support the work of the Commission.

<sup>840</sup> WCPFC, *Rules of Procedure* (First adopted at the Inaugural Session, Pohnpei, Federated States of Micronesia, 9-10 December 2004) <https://www.wcpfc.int/doc/commission-01/rules-procedure>. The WCPFC *Rules of*

from consideration of these case studies. The World Trade Organization (WTO), if it revisited its relationship with NGOs<sup>841</sup> to include direct observer status may also benefit from consideration of the *Rules of Procedure and Debate* of the Whaling Commission and CAMLR Commission. The Intergovernmental Panel for Climate Change (IPCC) would also benefit as its procedures and policies lack clarity on observer status and engagement.<sup>842</sup> The successes of the Red Cross and other IHL-related NGOs in supporting the principles and purposes of the *Geneva Conventions*<sup>843</sup> should speak clearly to the significance of adherence to the object and purpose.

Clearly, as with this thesis, an in depth analysis needs to be done in order to clarify the nature of NGO engagement with the treaty body. However, the limitation of this thesis is not a lack of relevance to other organizations or fields but the impossibility of engaging more than two case studies in 100,000 words. Further research in environmental treaty bodies in particular, testing the benefits of the object and purpose principles as significant for guiding NGO engagement is likely to bear out the same result: NGO adherence to the contents of a treaty is important to the functionality of a treaty body. An example of the benefits of adherence is the status accorded to the hybrid NGO, IUCN. The status of the IUCN is commensurate with its work, which aligns clearly with object

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*Procedure* (December 2018) Rule 36 only requires that NGOs be ‘concerned with matters relevant to the implementation of the Convention’ – wording that does not require concern for the overarching principles of the convention.

<sup>841</sup> *Guidelines for Arrangements on Relations with Non-Governmental Organizations* WT/L/162 (23 July 1996) (Decision of 18 July 1996).

<sup>842</sup> IPCC, *IPCC Policy and Process for Admitting Observer Organizations* (Adopted by the Panel at the Twenty-fifth session) (Mauritius, 26-28 April 2006) <https://archive.ipcc.ch/pdf/ipcc-principles/ipcc-principles-observer-org.pdf>; IPCC, *IPCC Communications Strategy* (Adopted by the Panel at the Thirty-fifth session) (Geneva, 6-9 June 2012) [https://www.ipcc.ch/site/assets/uploads/2018/09/IPCC\\_Communications\\_Strategy.pdf](https://www.ipcc.ch/site/assets/uploads/2018/09/IPCC_Communications_Strategy.pdf); Audiences (5); IPCC, *Appendix A to the Principles Governing IPCC Work: Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports* (Adopted at the Fifteenth Session) (San Jose, 15-18 April 1999) <https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles-appendix-a-final.pdf> – there is no clear expectation of observer behaviour throughout the document.

<sup>843</sup> See for example, Ido Rosenzweig, ‘Promoting respect for IHL by NGOs: The case of ALMA – Association for the Promotion of IHL’ (2014) 96(895/986) *International Review of the Red Cross* 1029.



and purpose principles. This elevated status holds true for the IUCN not just in the Whaling Commission and CAMLR Commission, but also in the United Nations, unlike any other NGO, where it has permanent observer status.<sup>844</sup>

#### 8.4 Amending *Rules of Procedure* to support object and purpose principles

It is not possible to hold different NGO behaviours to different levels of accountability. Whether the multi-faceted behaviours of NGOs are primarily, for example, lobbying or information provision, invocation or termination can be difficult to resolve – many documentary submissions fall into multiple categories, such as lobbying, information and invocation. Part 8.2 discussed how NGO behaviours in the CAMLR Commission and Whaling Commission fell within the broader literature on NGO behaviours in international law, underscoring the wide acknowledgement of the influence NGOs wield in international institutions. Part 8.3 demonstrated that there has been divergence between the two Commission in the success of observer NGO regulation, and resulting negative impacts where regulation has fallen short of focussing NGO behaviours on object and purpose principles.

This part proposes amendments to the *Rules of Procedure* in both Commissions, and the *Rules of Debate* in the Whaling Commission to develop focus on the fundamental role of NGOs to assist and support the work of the Commissions – the role assigned to them by Article IV of the *Whaling Convention* and Article XXIII of the *CAMLR Convention*. These broad changes should strengthen expectations on NGOs to act in consideration of the legal mandate of the Commissions, and to pursue a supportive role in relation to the work of the Commissions.

There are aspects of the *Whaling Commission Rules of Procedure* that may benefit the CAMLR Commission, and vice versa. Alterations to the *Rules of Procedure* for the CAMLR Commission and Whaling Commission would not be parallel however alterations to the *Rules of Procedure* for both Commissions may be beneficial. Considering the development of the CAMLR Commission meetings, and the position of NGOs within it

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<sup>844</sup> United Nations, *Permanent Observers: Intergovernmental and Other Organizations* (no date) <https://www.un.org/en/sections/member-states/intergovernmental-and-other-organizations/index.html>. Despite its formative documents and legal status, the IUCN is typically classified as an intergovernmental organization.

under the *Rules*, the most beneficial amendment would be limitation of delegation sizes. Both speaking and documentary rights are functionally directed toward object and purpose principles, and the rules of invitation favour the continued development of cooperative and supportive roles among NGOs.

For the Whaling Commission, the lack of connection between the Convention and the *Rules* needs to be addressed, as do the general rules around documentary submission, use of speaking rights, and the process of invitation to encourage greater consideration of the work of the Commission in light of its Convention's object and purpose. The contributions of observers and NGOs may benefit from clearer articulation of expectations to support the work of the Commission, and so support the rule of law rather than partisanship.

#### 8.4.1 The CAMLR Commission Rules of Procedure

The *CAMLR Commission Rules of Procedure* may benefit from clearer definition of the size of observer delegations. This is due to the large increases in delegation numbers over the last decade, and there being no clear commensurate benefit to this growth. This indirectly impacts on object and purpose principle consideration by requiring NGO observers to consider the utility of additional advisers and delegates on their delegation in terms of *how* these delegates would contribute to the work of the Commission, or the NGO's position in relation to that work.

The *CAMLR Commission Rules of Procedure* may also benefit from the provision in the Whaling Commission *Rules* that stipulates there may be seating limitations and so the number of observers from each NGO might be limited accordingly. The *Whaling Commission Rules of Procedure* at C. Observers 1(b) reads:

*... Observers from each non-governmental organization will be allowed seating in the meeting. However, seating limitations may require that the number of observers from each non-governmental organization be limited. The Secretariat will notify accredited non-governmental organizations of any seating limitations in advance of the meeting.*

The CAMLR Commission Rules have no equivalent provision. As noted in Chapter 5, the growth in numbers of NGO delegates has far exceeded the initial 1988 stipulation of one delegate per observer organization. Nor are there clear reasons why the expanded number of delegates is beneficial to the participation of the observer NGOs. As with member state

delegations, the capacity to engage with the Commission should not be hindered, and so a primary and a secondary observer delegate should be permitted, to mirror the Head of Delegation and second in charge that is accorded to member states. However, beyond this, while member states provide membership dues, there are no financial costs imposed on observers to attend Commission meetings beyond their own capacity to attend. The right of member states to have large numbers of advisors attend does not accrue to observer NGOs that pay no commensurate fee to have a right of attendance.

A proposed draft paragraph to insert into the CAMLR Commission Rules would allow a first and second delegate, to allow full participation if something were to impact on the first delegate's capacity to participate. However, the attendance of further delegates needs to be justified by reference to qualifications or capacity to contribute to the agenda and work of the Commission. The proposed text is:

*Two delegates for each observer will be allowed seating in the meeting. However, the value of the attendance of further delegates must be presented to the Secretariat. Such application should contain details of how further proposed representatives within the observer delegation can contribute to the work of the Commission.*

While delegation size may seem a small matter, the requirements for a smaller delegation size may focus the work of the observer NGOs to ensure that substance is not replaced by or overshadowed by size. Ensuring that delegation composition reflects the engagement of the NGO with issues before the Commission gives greater credibility. Looking at attendance numbers over the course of the Commission's life, it is clear that the NGOs with the most credibility or practical contributions sent the lowest numbers of delegates – SCAR and IUCN both consistently sent less than two delegates. Similarly, looking at the composition of the COLTO and ARK delegations, delegates are either scientific advisors or representatives from companies invested in Southern Ocean resource extraction. The ASOC delegation, by contrast, includes delegates from member NGOs that have no direct contribution or investment in matters before the CAMLR Commission. While some representatives are attached to universities and are present for the purposes of research,<sup>845</sup> delegates from national NGOs who cannot provide or extract material value from discussions simply clutter

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<sup>845</sup> Cassandra M Brooks et al, 'Challenging the 'Right to Fish' in a Fast-Changing Ocean' (2014) 33(3) *Stanford Environmental Law Journal* 289; Cassandra M Brooks et al, 'Science-based management in decline in the Southern Ocean' (2016) 354(6309) *Science* 185; Jacquet et al., above n 166.

the appearance of the ASOC delegation. For the sake of economy, efficiency, and substantive value, it is recommended that the Commission limit delegation numbers.

#### 8.4.2 The *Whaling Commission Rules of Procedure and Rules of Debate*

The *Whaling Commission Rules of Procedure* could benefit from the adaptation and inclusion of several aspects of the CAMLR Commission *Rules*, as well as from some reorganization. There are three clear areas for improvement. The first concerns expectations around invitations for observer status, and the ongoing status of observers once accredited. The second concerns the rules around content in documentary submissions. The third and final concerns the *Whaling Commission Rules of Debate* and the *Rules of Procedure*. This focuses on clearer articulation of the expectations of oral statement content, and the consequences for abuse of the *Rules of Debate* where an NGO speaks to the agenda. It is suggested that there be three distinct sections on applications and invitations, as is currently contained in the *Rules*, as well as two distinct sections on speaking rights and documentary submission, as currently there is a lack of structure. Amendments to the *Rules* are suggested in terms of object and purpose principles.

The text on observer invitations in the *Whaling Commission Rules of Procedure* states that '(b) any non-governmental organization which expresses an interest in matters covered by the Convention may be accredited as an observer.'<sup>846</sup> The text further notes that 'Once a non-governmental organization has been accredited through the application process above, it will remain accredited until the Commission decides otherwise.' The first part of the text is arguably inadequate to the documentary and oral rights attached to observer status; it also directs attention to matters in the Convention rather than matters before the Commission. The text also places decision making in the applicant's hands. Consider the text of the *CAMLR Commission Rules of Procedure*, which state that 'the Commission may ... invite, as appropriate, organizations named in Article XXIII(2) and (3) of the Convention.' The Commission, in this text, decides the invitation.

In terms of practice, there is also divergence between the two Commissions. At the end of each CAMLR Commission annual meeting, the Commission decides which observers will have an invitation extended to them for the following year's meeting. This is in contrast to the Whaling Commission, where practice has indicated that without a

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<sup>846</sup> *Whaling Commission Rules of Procedure*, Rule C. Observers 1.(b).

significant controversy, observers are automatically reaccredited and allowed to attend the next meeting of the Commission.<sup>847</sup>

The remedy requires two things. Firstly, the application process for accreditation as an observer should follow similar strictures as those imposed in the CAMLR Commission in the application process. While the text of the CAMLR Commission *Rules* is not express in expectations of consideration of the object and purpose, the practice of the Commission has demonstrated the expectation that NGOs applying for observer status be competent to materially contribute to the work of the Commission, subject to its object and purpose.<sup>848</sup> The text of the Whaling Commission *Rules* could be amended to:

*Any non-governmental organization which demonstrates a capacity to contribute to the work of the Commission, may be accredited as an observer.*

*The text on administrative requirements should be retained. However, the text could stipulate that where an objection to an NGO applicant is raised by a member state a vote will be required. Suggested text may look like:*

*Where a member state raises an objection to an NGO observer application, the Commission may by post or by other means of textual communication decide by vote whether to extend an invitation to the NGO.*

*Decision-making on the invitation of an NGO applicant as observer will be taken by a simple majority according to Article III.2 of the Convention. Votes shall be communicated by member states directly to the Executive Secretary, who will notify the NGO and member states of the result of the vote. Decisions shall be made no later than 30 days prior to the start of the meeting.*

Including this text gives control of NGO application approval to Whaling Commission member states by allowing an objection to be raised. In the CAMLR Commission, the capacity of states to object to the attendance of an NGO is supported by the consensus voting mechanism and by the application process itself. In the CAMLR Commission, the ASOC application for observer status was rejected three years in a row until ASOC was able to demonstrate the capacity to contribute to and support the work of the Commission. Another example of the mechanism for ensuring object and purpose

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<sup>847</sup> See Chapter 5 at [5.3.3].

<sup>848</sup> See Chapter 5 at [5.3.1].

compliance is the objection of Chile to the IUCN observer in 1995. The capacity of states to reject NGO observers has ensured ongoing compliant behaviour by the IUCN delegate, and the objection was withdrawn the following year upon IUCN compliance.<sup>849</sup> In the Whaling Commission, text providing for member states to object to an NGO applicant may draw clearer lines around the expectations on observer NGOs to contribute to the work of the Commission.

The final aspect of Rule C.1(b) on accreditation and invitations reads:

*Once a non-governmental organization has been accredited through the application process above, it will remain accredited until the Commission decides otherwise.*

By providing a mechanism to object to an applicant NGO, the *Rules* can then allow for ongoing accreditation, as the text provides, but with a clearer mechanism for what ‘until the Commission decides otherwise’ means. It does not need further amendment.

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<sup>849</sup> CCAMLR-XIV Meeting of 24 October – 3 November 1995, ‘Report of the Fourteenth Meeting of the Commission’ (Hobart, Australia, adopted 3 November 1995) [14.2] and [14.3].

Current text of Rule C. Observers 1(b)	Proposed text of Rule C. Observers 1(b)
<p>(b) Any <u>non-governmental organization which expresses an interest in matters covered by the Convention</u>, may be accredited as an observer. Requests for accreditation must be submitted in writing to the Commission 60 days prior to the start of the meeting and the Commission may issue an invitation with respect to such request. Such submissions shall include the standard application form for non-governmental organizations which will be provided by the Secretariat. These applications shall remain available for review by Contracting Governments.</p> <p>Once a non-governmental organization has been accredited through the application process above, it will remain accredited until the Commission decides otherwise.</p>	<p><i>(b) Any non-governmental organization which demonstrates a capacity to contribute to the work of the Commission, may be accredited as an observer. Requests for accreditation must be submitted in writing to the Commission 60 days prior to the start of the meeting and the Commission may issue an invitation with respect to such request. Such submissions shall include the standard application form for non-governmental organizations which will be provided by the Secretariat. These applications shall remain available for review by Contracting Governments.</i></p> <p><i><u>Where a member state raises an objection to an observer application from an NGO, the Commission may by post or by other means of textual communication decide by vote whether to extend an invitation to the NGO.</u></i></p> <p><i><u>Decision-making on the invitation of an NGO applicant as observer will be taken by a simple majority according the Article III.2 of the Convention. Votes shall be communicated by member states directly to the Executive Secretary.</u></i></p> <p><i><u>Decisions shall be made 30 days prior to the start of the meeting.</u></i></p> <p>Once a non-governmental organization has been accredited through the application process above, it will remain accredited until the Commission decides otherwise.</p>

*Table 8.1 Suggested amended text for Rule C. Observers 1(b)*

Of greatest significance in these suggestions is that there is an expectation on applicants to demonstrate a capacity to contribute to the work of the Commission, rather than an interest in matters covered by the convention. The work of the Commission may not itself be compliant with its own Convention, and so NGOs demonstrating a capacity to contribute to the work of the Commission may not be compliant either. Nonetheless,

observer applicants being put on notice of a higher expectation introduces the possibility of more directed contributions.

The second of aspect of the *Whaling Commission Rules of Procedure* that may be amended to engage more fully with the object and purpose principles through the work of the Commission concerns the rules on documentary submissions and speaking rights. The rules on speaking rights contain one limb of observer documentary submission rights. Speaking rights and documentary submission should be distinct and separate. The text on speaking rights contains directions on the submission of information documents, while Opening Statement submissions are dealt with separately. Below, the issues with the text as it stands will be discussed, followed by proposed amendments specifically dividing oral and written submissions into two distinct rules in order to provide clarity.

The first suggested amendment is to remove the capacity for observer NGOs to submit Opening Statements. On the submission of Opening Statements, the text of the *Rules* reads:

*Q. Commission Documents*

*3. Observers admitted under Rule of Procedure C.1.(a) and (b) may submit Opening Statements which will be included in the official documentation of the Biennial or other Meeting concerned. They shall be presented in the format and the quantities determined by the Secretariat for meeting documentation. The content of the Opening Statements shall be relevant to matters under consideration by the Commission, and shall be in the form of views and comments made to the Commission in general rather than directed to any individual or group of Contracting Governments.*

This rule does not distinguish between non-party government observers and intergovernmental organizations, under C.1.(a) and NGOs, under C.1.(b). Both categories are accorded the same rights to have the text of their Opening Statements ‘included in the official documentation of the Biennial or other Meeting’. Contrast this with the *CAMLR Commission Rules of Procedure*, which state that documents submitted to the Secretariat for distribution to Commission members ‘shall only be considered as Commission documents if decided by the Commission.’ Effectively, this permits the Commission and its members to challenge documents submitted by observers and have them removed from the record. This happened in 2001, with the COLTO *Rogues Gallery*,



which met with significant disapprobation and was removed from the Commission documentary record.<sup>850</sup> While COLTO did voluntarily withdraw the document, the *Rules of Procedure* make provision for the Commission to reject a document without the cooperation of its author.

A suggested amendment to the Whaling Commission *Rules* on Opening Statements would make a distinction between C.1.(a) and C.1.(b) observers, excluding C.1.(b) observers from submitting Opening Statements.

*Observers admitted under Rule of Procedure C.1.(a) may submit Opening Statements which will be included in the official documentation of the Biennial or other Meeting concerned. They shall be presented in the format and the quantities determined by the Secretariat for meeting documentation. The content of the Opening Statements shall be relevant to matters under consideration by the Commission, and shall be in the form of views and comments made to the Commission in general rather than directed to any individual or group of Contracting Governments.*

The submission of Opening Statements is a Commission practice dating back to 1967. While Opening Statements from member states, non-party states and intergovernmental organizations are significant in establishing the position of decision-makers, its retention is not essential to the capacity of observer NGOs to contribute to the work of the Commission. NGOs are not decision-makers in a formal sense. Their position in relation to the agenda or the Commission does not directly presage the development of new intergovernmental organization relationships or an increase in membership numbers. Whether an NGO has 'views or comments' to make is not relevant to supporting the work of the Commission.

The NGO lobbying role and other roles of influence are significant, but in the context of observers the NGO roles of information provision and support of the Commission are more significant than the repetition of positions clearly advertised in NGO material and demonstrated in domestic behaviours. Within the decision-making time frame of a Commission meeting, it is the capacity to contribute to that decision-making that matters, not the opinion of an observer on how that decision should be made. Emphasis needs to be on supporting and contributing to the work of the Commission.

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<sup>850</sup> See discussion in Chapter 6 at [6.4.3].

For these reasons, it is advocated that Opening Statements for observer NGOs be removed.

The capacity for observers to submit information documents, contained in Rule C.3 should be reworked and made a distinct rule. The relevant text in Rule C.3 currently reads:

*C.3 ... Observers might also submit documents for information to the delegations and observers participating in such sessions, provided these are submitted through the Secretariat at least 48 hours before the session in which they are intended to be made available, and are duly authored or endorsed by the accredited organization making the submission, which is to be held responsible for its contents.*

The suggested amendment would be:

*C.4 Observers admitted under Rule of Procedure C.1.(a) and C.1.(b) may submit Information Documents for the Commission's consideration. Information Documents are to be submitted through the Secretariat at least seven days before the Biennial or other meeting concerned. The content of Information Documents shall be relevant to matters under consideration by the Commission. Information Documents shall be directed to the Commission in general rather than directed to any individual or group of Contracting Governments.*

*Information Documents shall be presented in the format and the quantities determined by the Secretariat for meeting documentation. Unless a member state objects, Information Documents shall be included in the official documentation of the Biennial or other Meeting concerned.*

*If a member state objects to an Information Document, the matter is to be considered by the Commission. If consensus cannot be reached on its inclusion, the document is to be excluded from the official documentation of the Biennial or other Meeting concerned.*

The reasoning behind these amendments is an expectation of consideration for the work of the Commission under its Convention. Firstly, as NGO observers cannot submit Opening Statements, and there are fixed agenda items for the Whaling Commission biennial meetings, the '48 hours before the session' is too short a time period for submission of documents that are to be included in official documentation. Moreover, there should be sufficient time for member state delegations to consider the contents of such Information Documents before the commencement of the meeting.

The capacity for member states to object to the inclusion of Information Documents in the official documentation is an avenue for states to come to a clearer and stronger position in relation to the direction of the work of the Commission, and thus the application of the object and purpose principles.

*The capacity to include expectations of format falls to the Secretariat. The Secretariat could stipulate a document format that requires a perambulatory introduction that indicates the position of the Information Document in relation to the object and purpose principles of the Whaling Convention. This removes the subjectivity of 'views and comments', which is allowed for observers under 3.1.(a), and focuses on support of the work of the Commission.*

*The final matter concerns both the Whaling Commission Rules of Procedure and Rules of Debate and the regulation of NGO engagement with speaking rights. The current Rules of Procedure state that*

*3. Observers accredited in accordance with rule C.1.(a) and (b) will have speaking rights during Plenary sessions and sessions of Commission subsidiary groups and Committees to which they are admitted to under C.2, in accordance with the Rules of Debate of the Commission.*

In relation to speaking rights, there is no amendment to be made to the Rules of Procedure text as this rule is clear, and regulation of speaking rights falls under the Rules of Debate. The Rules of Debate on speaking rights read:

*A. Right to Speak*

*1. The Chair shall call upon speakers in the order in which they signify their desire to speak, with the exception of accredited Observers, which should be allowed to speak only after all Commissioners desiring to speak do so. As a general rule, Observers will only be allowed to speak once at each Agenda item under discussion, and at the discretion of the Chair.*

*2. A Commissioner or Observer may speak only if called upon by the Chair, who may call a speaker to order if his/her remarks are not relevant to the subject under discussion.*

An issue observable in 2014, 2016 and 2018 in observers exercising access to speaking rights has been the use of speaking rights as a vehicle to address issues not on the agenda,

or to directly attack a member state.<sup>851</sup> While the current rules indicate that documents should be directed to the Commission as a whole and not toward any member state, there is no clear prohibition on such behaviour in the use of speaking rights. Nor is there a clear remedy for the Chair to direct an Observer where there is more than one call to order. It is suggested that the Whaling Commission *Rules of Debate*<sup>852</sup> clearly indicate a difference between the speaking rights of member states and observers. Rule A could be extended to include:

*5. The Chair has the discretion to stop an Observer from continuing to address the Commission, at five minutes and if that Observer is called to order a second time.*

*6. Member states have the discretion to call on the Chair to make a point of order if an Observer uses speaking rights to direct hostile commentary toward that member state.*

*The Chair has the discretion to allow or disallow an Observer to continue where a member state so objects.*

The rationale for all changes is simple. The Commission, and its members must have the capacity to moderate the content of observer NGO contributions to the Commission's work. By instituting a process where the invitation and accreditation process involves a demonstration of a capacity to contribute to the work of the Commission, the focus of observer NGO applications is already directed toward material consideration of the constituent parts of that work: the animating principles of the object and purpose.

By removing the capacity for NGO observers to provide Opening Statements, this draws a clear divide between decision-makers and decision-making bodies, such as intergovernmental organizations. Refocusing on documentary contributions of NGO observers on Information Documents also encourages the contribution of work intended to support the decision-making work of the Commission. It also supports the contribution of work in line with aspects of NGO behaviours, such as information building, curtailing the sole focus of Opening Statements on lobbying.

The introduction of clearer rules of engagement for NGO observers speaking to the agenda, also focuses the contributions to engage directly with the work of the

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<sup>851</sup> See above Chapter 4 at [4.4.3]; above Chapter 5 [5.3.2].

<sup>852</sup> *Whaling Commission Rules of Debate*, A. Right to Speak.

Commission, rather than pursue an ulterior agenda that may not support effective decision-making among member states.

## 8.5 Conclusion

This chapter has considered the behaviours of NGOs in the CAMLR Commission and Whaling Commission in light of literature on international NGO behaviours. It has made connections between the two Commissions and broader NGO practices. Discussion in 8.3 considered why object and purpose principles should be considered as a fundamental reference point for the rule of law, and accountability of NGOs within intergovernmental bodies. Part 8.4 brought together these discussions to consider how the *Rules of Procedure* and *Rules of Debate* might best be amended to encourage NGO engagement that supports the work of the Commissions, and in doing so, creates an underlying focus on the object and purpose principles of the Conventions.

It was observed in Chapter Five, that there is a genuine need for NGOs to counterbalance the imbalance of states that themselves deviate from a balanced consideration of the object and purpose principles governing their membership of an RFB. This was observable in the engagement of NGOs throughout the 1970s and into the mid-1980s in advocating strongly for conservation where several member state in the Whaling Commission focused too heavily on industry development and use, to the detriment of a balanced interpretation of the *Whaling Convention* object and purpose. This was also observed in the CAMLR Commission, in the context of COLTO and the *Rogues Gallery*, as well as the interventions of Sea Shepherd and COLTO to supplement the capacity of states to prevent IUU fishing vessels from successful fishing in the Southern Ocean.

However, where there is a balanced engagement of states the primary function of NGO observers is to support the work of the Commission. The impasse in the Whaling Commission, which developed in the 1990s around the implementation of the RMP, has continued for over two decades. A balanced interpretation of the object and purpose principles, and their implementation in decision-making has been, in part, inhibited by the nature of NGO engagement in meetings, which has been largely ungoverned by consideration of the work of the Commission. The contributions of all classes of NGOs in the CAMLR Commission – industry, scientific and environmental, demonstrates the

functional contributions that can be made by NGOs where the work of the Commission, and the instrument under which it acts, are given primary consideration.

The answer to the question of whether NGOs support the object and purpose principles in their engagement with RFBs in the Southern Ocean is that sometimes they do and sometimes they don't. The distinctions between these circumstances has highlighted that effective decision-making comes from a balanced engagement with all the principles of an object and purpose, rather than selective reading of a treaty's animating principles. While the ethical or moral problem of whaling remains a non-negotiable stance of many NGOs, the impasse in the Whaling Commission should not be supported by NGOs past its current 20-year stalemate. This is an untenable situation if the rule of law is to be considered as a primary aspect of international law and institutions.

The high degree of politicization of the Whaling Commission is not the sole domain of NGOs. There is a degree of fault in the behaviour of various member states in their interpretation of the Convention. However, reinforcing the expectation of NGOs to support the work of the Commission would underscore the necessity of non-partisan engagement by member states to reach decisions that accord with the broad range of views on what constitutes acceptable use of whale resources. In a Commission that includes culturally diverse viewpoints, even with the exit of Japan, there should be consideration of both non-consumptive and consumptive use of whales according to the convention. The balance of concerns in the CAMLR Commission should be a reference point for the Whaling Commission to move toward more effective deliberations and decision-making. The use of the object and purpose principles as an analytical tool may be of use in reviewing various *Rules of Procedure* in other international treaty bodies.

# Appendices

## Appendix 1: 2014 IWC and CCAMLR questionnaires

### CCAMLR: 2014 questionnaires for member states

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#### OTHER - NGO QUESTIONNAIRE

Engagement with International Whaling Commission (CCAMLR)

##### General

*This section is designed to receive feedback on your organisation and your role in the CCAMLR. If you would prefer not to be identified by name or organisation, please check the 'confidential' box at questions 1 and 4.*

**1. Identity confidentiality**

I would like you to keep my identity confidential (your organisational role will also be confidential) ☐

You may use my name in the manner described in 'Ethics Information' ☐

**2. What is your name**

**3. What is your organisation?**

**4. Organisation identity confidentiality**

Please keep the name of my organisation confidential ☐

You may use the name of my organisation ☐

**5. What is your role, specific to you, in CCAMLR?**

**6. Do you liaise or interact with NGOs in CCAMLR?**

Yes ☐

No ☐

**7. Which NGOs?**

**8. How long have you been personally involved with CCAMLR?**

**9. How many staff are you aware of that work for your organisation within CCAMLR?**

Lucy de Vreeze [ladde@utas.edu.au](mailto:ladde@utas.edu.au)  
PhD Candidate, University of Tasmania, Australia

### **International law and legal issues**

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

**10. Do issues of sovereignty ever arise in the course of your work?**

Yes ☐

No ☐

**11. If so, how?**

**12. Have legal issues ever arisen over the relationship between NGOs and the state partners of CCAMLR in the course of your work?**

Yes ☐

No ☐

**13. What was/were the legal issue/s?**



## Engagement

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

14. With which bodies/states of CCAMLR does your organisation engage aside from NGOs?

15. Which areas of CCAMLR do you contribute to?

- a) Scientific Contributions ☐
  - a. Reports ☐
  - b. Research ☐
- b) Capacity building and/or development ☐
- c) Funding (Financial Resources) ☐
- d) Media ☐
- e) Marine Protected Areas ☐
- f) Climate Change Adaptation ☐
- g) Monitoring and Evaluation ☐
- h) Liaison ☐
- i) Other ☐

16. Would you please specify the program/s with which and in which countries you have personal experience.

17. Is your organisation engaged with Regional Fisheries Bodies or other organisations on the subject of whaling and conservation?

Yes ☐

No ☐

## Assessment

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

**18. How effective has the relationship with NGOs been in furthering the goals of CCAMLR?**

- Very effective ☐
- Effective ☐
- Neutral ☐
- Somewhat effective ☐
- Not effective at all ☐

**19. What have been the key achievements of CCAMLR in the past decade?**

**20. What are the key issues/challenges for CCAMLR in the next ten years?**

**21. Do you believe CCAMLR has the competency to address these issues?**

Yes ☐

No ☐

**15a. Why?**

**22. How effective has the general relationship between CCAMLR and NGOs been in addressing whaling conservation issues?**

- Very effective ☐
- Effective ☐
- Neutral ☐
- Somewhat effective ☐
- Not effective at all ☐

**14a. In what areas in particular have you noted the level of effectiveness?**

**23. Is there potential for greater involvement of NGOs with CCAMLR?**

- Yes ☐
- No ☐

**25a. If yes, how? If no, why?**

**24. Is NGO involvement in CCAMLR essential to the success of CCAMLR? In which areas in particular, if your answer is yes?**

Lucy de Vreeze [ladde@utas.edu.au](mailto:ladde@utas.edu.au)  
PhD Candidate, University of Tasmania, Australia

**25. Thank you for taking the time to complete this questionnaire. Here is some extra space just in case you want to write something more.**

Lucy de Vreeze [ldcde@utas.edu.au](mailto:ldcde@utas.edu.au)  
PhD Candidate, University of Tasmania, Australia

## NGO QUESTIONNAIRE

Engagement with the Commission for the Conservation of Antarctic Marine Living Resources  
(CCAMLR)

### General

*This section is designed to receive feedback on your organisation and your role in the CCAMLR. If you would prefer not to be identified by name or organisation, please check the 'confidential' box at questions 1 and 4.*

**1. Identity confidentiality**

I would like you to keep my identity confidential (your organisational role will also not be identified)  
☐

You may use my name in the manner described in 'Ethics Information'  
☐

**2. What is your name**

**3. Which class of NGO does your organisation fall into?**

National environmental NGO ☐

International environmental NGO ☐

**4. Organisation identity confidentiality**

Please keep the name of my organisation confidential ☐

You may use the name of my organisation ☐

**5. What is the name of your organisation?**

**6. What is your role, specific to you, at the Commission Meeting and in relation to CCAMLR?**

**7. Do you liaise or interact with government staff or representatives from any of the state parties to CCAMLR?**

Yes ☐

No ☐

**8. How long has your organisation been involved with CCAMLR?**

**9. How long have you been personally involved with CCAMLR?**

**10. How many staff are you aware of that work for your organisation, on the topic of the CCAMLR or Southern Oceans conservation?**

### International law and legal issues

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

**11. Have you or has your organisation played a decisive or influential role in the decisions of the Secretariat or any member state?**

Yes ☐

No ☐

**12. When and how was your organisation influential or decisive in decision making?**

**13. Do issues of sovereignty ever arise in the course of your work?**

Yes ☐

No ☐

**14. If so, how?**

**15. Have legal issues ever arisen over the relationship between NGOs the CCAMLR Secretariat, states parties or the Commission in the course of your work?**

Yes ☐

No ☐

**16. What was/were the legal issue/s?**

## Engagement

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

17. With which bodies of CCAMLR, does your organisation primarily engage?

18. How does your organisation formally engage?

- a) Scientific Contributions ☐
  - a. Reports ☐
  - b. Research ☐
- b) Capacity building and/or development ☐
- c) Funding (Financial Resources) ☐
- d) Media ☐
- e) Monitoring and Evaluation ☐
- f) Meetings ☐
- g) Other

19. Would you please specify the areas of CCAMLR's jurisdiction with which you have personal experience.

20. Is your organisation engaged with Regional Fisheries Bodies or other conservation organisations on the subject of Southern Ocean conservation?

Yes ☐

No ☐

## Assessment

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

**21. How effective has your relationship with CCAMLR been in supporting the aims of your organisation?**

- Very effective ☐
- Effective ☐
- Neutral ☐
- Somewhat effective ☐
- Not effective at all ☐

**22. In what areas in particular have you noted this level of effectiveness?**

**23. What have been the key achievements of CCAMLR in recent years?**

**24. What are the key issues/challenges for CCAMLR in the next ten years?**

**25. Do you believe CCAMLR has the competency to address these issues?**

Yes ☐

No ☐

**15a. Why?**



**26. Is there potential for greater involvement of NGOs with CCAMLR?**

Yes ☐

No ☐

**25a. If yes, how? If no, why?**

**27. In what ways is your organisation making material contributions to conservation in the Southern Ocean?**

**28. Is NGO involvement in the CCAMLR essential to any aspect of conservation issues at CCAMLR? In which areas in particular, if your answer is yes?**

Lucy de Vreeze [ladde@utas.edu.au](mailto:ladde@utas.edu.au)  
PhD Candidate, University of Tasmania, Australia

**29. Thank you for taking the time to complete this questionnaire. Here is some extra space just in case you want to write something more.**

Lucy de Vreeze [ladde@utas.edu.au](mailto:ladde@utas.edu.au)  
PhD Candidate, University of Tasmania, Australia

## OTHER - NGO QUESTIONNAIRE

Engagement with International Whaling Commission (IWC)

### General

*This section is designed to receive feedback on your organisation and your role in the IWC. If you would prefer not to be identified by name or organisation, please check the 'confidential' box at questions 1 and 4.*

**1. Identity confidentiality**

I would like you to keep my identity confidential (your organisational role will also be confidential) ☐

You may use my name in the manner described in 'Ethics Information' ☐

**2. What is your name**

**3. What is your organisation?**

**4. Organisation identity confidentiality**

Please keep the name of my organisation confidential ☐

You may use the name of my organisation ☐

**5. What is your role, specific to you, in the IWC?**

**6. Do you liaise or interact with NGOs in the IWC?**

Yes ☐

No ☐

**7. Which NGOs?**

**8. How long have you been personally involved with IWC?**

**9. How many staff are you aware of that work for your organisation within the IWC?**

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PhD Candidate, University of Tasmania, Australia

## International law and legal issues

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

**10. Do issues of sovereignty ever arise in the course of your work?**

Yes ☐

No ☐

**11. If so, how?**

**12. Have legal issues ever arisen over the relationship between NGOs and the state partners of IWC in the course of your work?**

Yes ☐

No ☐

**13. What was/were the legal issue/s?**

## Engagement

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

14. With which bodies/states of the IWC does your organisation engage aside from NGOs?

15. Which areas of the IWC do you contribute to?

- a) Scientific Contributions ☐
  - a. Reports ☐
  - b. Research ☐
- b) Capacity building and/or development ☐
- c) Funding (Financial Resources) ☐
- d) Media ☐
- e) Marine Protected Areas ☐
- f) Climate Change Adaptation ☐
- g) Monitoring and Evaluation ☐
- h) Liaison ☐
- i) Other ☐

16. Would you please specify the program/s with which and in which countries you have personal experience.

17. Is your organisation engaged with Regional Fisheries Bodies or other organisations on the subject of whaling and conservation?

Yes ☐

No ☐

## Assessment

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

**18. How effective has the relationship with NGOs been in furthering the goals of the IWC?**

- Very effective ☐
- Effective ☐
- Neutral ☐
- Somewhat effective ☐
- Not effective at all ☐

**19. What have been the key achievements of IWC in the past decade?**

**20. What are the key issues/challenges for IWC in the next ten years?**

**21. Do you believe IWC has the competency to address these issues?**

Yes ☐

No ☐

**15a. Why?**

**22. How effective has the general relationship between IWC and NGOs been in addressing whaling conservation issues?**

- Very effective ☐
- Effective ☐
- Neutral ☐
- Somewhat effective ☐
- Not effective at all ☐

**14a. In what areas in particular have you noted the level of effectiveness?**

**23. Is there potential for greater involvement of NGOs with IWC?**

- Yes ☐
- No ☐

**25a. If yes, how? If no, why?**

**24. Is NGO involvement in IWC essential to the success of the IWC? In which areas in particular, if your answer is yes?**

Lucy de Vreeze [ladde@utas.edu.au](mailto:ladde@utas.edu.au)  
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**25. Thank you for taking the time to complete this questionnaire. Here is some extra space just in case you want to write something more.**



Lucy de Vreeze [ldcde@utas.edu.au](mailto:ldcde@utas.edu.au)  
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## NGO QUESTIONNAIRE

Engagement with the International Whaling Commission (IWC)

### General

*This section is designed to receive feedback on your organisation and your role in the IWC. If you would prefer not to be identified by name or organisation, please check the 'confidential' box at questions 1 and 4.*

**1. Identity confidentiality**

I would like you to keep my identity confidential (your organisational role will also not be identified)

☐

You may use my name in the manner described in 'Ethics Information'

☐

**2. What is your name**

**3. Which class of NGO does your organisation fall into?**

National environmental NGO ☐

International environmental NGO ☐

**4. Organisation identity confidentiality**

Please keep the name of my organisation confidential ☐

You may use the name of my organisation ☐

**5. What is the name of your organisation?**

**6. What is your role, specific to you, at the IWC Meeting and in relation to the IWC?**

**7. Do you liaise or interact with government staff or representatives from any of the state parties to the IWC?**

Yes ☐

No ☐

**8. How long has your organisation been involved with IWC?**

**9. How long have you been personally involved with IWC?**

**10. How many staff are you aware of that work for your organisation, on the topic of the IWC or whaling?**

### International law and legal issues

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

**11. Have you or has your organisation played a decisive or influential role in the decisions of the Secretariat or any member state?**

Yes ☐

No ☐

**12. When and how was your organisation influential or decisive in decision making?**

**13. Do issues of sovereignty ever arise in the course of your work?**

Yes ☐

No ☐

**14. If so, how?**

**15. Have legal issues ever arisen over the relationship between NGOs the IWC Secretariat, states parties or the Commission in the course of your work?**

Yes ☐

No ☐

**16. What was/were the legal issue/s?**

## Engagement

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

17. With which bodies of the IWC does your organisation primarily engage?

18. How does your organisation formally engage?

- a) Scientific Contributions ☐
  - a. Reports ☐
  - b. Research ☐
- b) Capacity building and/or development ☐
- c) Funding (Financial Resources) ☐
- d) Media ☐
- e) Monitoring and Evaluation ☐
- f) Liaison ☐

19. Would you please specify the program/s with which and in which countries you have personal experience.

20. Is your organisation engaged with Regional Fisheries Bodies or other conservation organisations on the subject of whaling and conservation?

Yes ☐

No ☐

## Assessment

*Note: No questions are compulsory, please only answer questions with which you are comfortable*

**21. How effective has your relationship with IWC been in supporting the aims of your organisation?**

- Very effective ☐
- Effective ☐
- Neutral ☐
- Somewhat effective ☐
- Not effective at all ☐

**22. In what areas in particular have you noted this level of effectiveness?**

**23. What have been the key achievements of the IWC in recent years?**

**24. What are the key issues/challenges for the IWC in the next ten years?**

**25. Do you believe the IWC has the competency to address these issues?**

- Yes ☐
- No ☐

**15a. Why?**

**26. Is there potential for greater involvement of NGOs with IWC?**

Yes ☐

No ☐

**25a. If yes, how? If no, why?**

**27. In what ways is your organisation making material contributions to conservation in whaling?**

**28. Is NGO involvement in the IWC essential to any aspect of whaling conservation issues at the IWC? In which areas in particular, if your answer is yes?**

Lucy de Vreeze [ladde@utas.edu.au](mailto:ladde@utas.edu.au)  
PhD Candidate, University of Tasmania, Australia

**29. Thank you for taking the time to complete this questionnaire. Here is some extra space just in case you want to write something more.**

## Appendix 2: 2016 IWC and CCAMLR questionnaires

### CCAMLR: 2016 Delegate questionnaire

*Socio-legal Analysis of NGO behaviours in the Southern Ocean: IWC and CCAMLR*

Dear CCAMLR Delegate,

#### Information Sheet

I am a PhD candidate at the University of Tasmania in Australia. My thesis is entitled, '*Socio-legal analysis of NGO behaviours in the Southern Ocean: IWC and CCAMLR*'. I am collecting qualitative data from CCAMLR state delegations on perceptions of NGO engagement with CCAMLR.

This short, one page questionnaire will only take a few minutes to complete. I would be very grateful if you took the time to complete this questionnaire. This research is important because the views of states are essential to providing a clear picture of how CCAMLR manages NGO actors, and will contribute to NGO understanding of how better to support the work of the Commission.

You do not need to identify your state party. If you have identified your member state you are entitled to withdraw your consent to the use of data at any time, you will also be de-identified in any reference. This questionnaire is entirely voluntary.

This research has ethics approval from the University of Tasmania: **H0014221**. Under the requirements of the Ethics Board, data is retained for 5 years in a secure location with responses de-identified before being destroyed.

If you have any questions please contact either me: [Lucy.deVreeze@utas.edu.au](mailto:Lucy.deVreeze@utas.edu.au) or my supervisor, [Julia.Jabour@utas.edu.au](mailto:Julia.Jabour@utas.edu.au)

Feel free to annotate the questionnaire if you have a particular comment to make.

***Please leave the completed questionnaire with the front office in the envelope provided***

Delegation:

Questionnaire – CCAMLR state delegations

**Do you regard ASOC as an integral part of the work of the Commission?**

No – not at all integral

Yes – on occasion useful

No – not useful

Yes – integral to the work of the Commission

No – inhibitive of the work of the Commission

Yes – Somewhat important

No – irrelevant

Yes – an important contributor

**In regards to ASOC and the decision-making process around the Ross Sea and East Antarctic MPAs which of the following reflects your perception?**

ASOC have hampered discussion in Commission meetings

ASOC have contributed very little to the discussion in Commission meetings

ASOC have contributed significantly to the discussion in Commission meetings

ASOC have been integral to the discussion in Commission meetings

**Thinking on COLTO and ARK, which of the following most closely reflects your perception?**

COLTO and ARK are important industry NGOs in CCAMLR

COLTO and ARK are more effective contributors than ASOC to Commission work

COLTO and ARK are not important in the work of the Commission

COLTO and ARK provide some useful contributions

COLTO and ARK hamper discussion in the Commission meeting

**In general, circle which of the NGOs fit the following criteria:**

***Very effective*** in supporting the work of the Commission

ASOC

COLTO

ARK

***Effective*** in supporting the work of the Commission

ASOC

COLTO

ARK

***Somewhat effective*** in supporting the work of the Commission

ASOC

COLTO

ARK

***Not at all effective*** in supporting the work of the Commission

ASOC

COLTO

ARK

***Occasionally effective*** in supporting the work of the Commission

ASOC

COLTO

ARK



## IWC: 2016 Delegate questionnaire

### *Legal and Qualitative Analysis of NGO behaviours in the Southern Ocean: IWC and CCAMLR*

Dear Delegate,

#### **Research Information**

I am a PhD candidate at the University of Tasmania in Australia. My thesis is entitled, '*Socio-legal analysis of NGO behaviours in the Southern Ocean: IWC and CCAMLR*'. I have travelled from Tasmania to collect qualitative data from IWC state delegations on their perceptions of NGO engagement with the IWC. This research is important to improve NGO understanding of how best to support the work of states and the IWC in carrying out the object and purpose of the *Whaling Convention*.

This short 6 question survey will only take **a few minutes** to complete. I would be **very grateful** if you took the time to complete it.

You do not need to identify your state party. If you have identified your member state you are entitled to withdraw your consent to the use of data at any time, you will also be de-identified in any reference. This questionnaire is entirely voluntary.

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 7479 or email [human.ethics@utas.edu.au](mailto:human.ethics@utas.edu.au). The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number: **H0014221**. Under the requirements of the Ethics Board, data is retained for 5 years in a secure location with responses de-identified where necessary.

*Thank you for taking the time to complete this questionnaire. I really appreciate it.*

If you have any questions please contact either me: [Lucy.deVreeze@utas.edu.au](mailto:Lucy.deVreeze@utas.edu.au) or my supervisor, [Julia.Jabour@utas.edu.au](mailto:Julia.Jabour@utas.edu.au)

**Feel free to annotate the questionnaire if you have a particular comment to make.**

**1 Do you regard environmental NGOs, such as Greenpeace, WWF and IFAW, as an integral part of the work of the Commission?**

No – not at all integral

No – not useful

No – inhibitive of the work of the Commission

No – irrelevant

Yes – on occasion useful

Yes – integral to the work of the Commission

Yes – Somewhat important

Yes – an important contributor

**2 Which of the following, if any, do you see as the primary value of NGO contributions?**

**You may choose more than one:**

1. Enhancing the knowledge base;
2. Advocacy and lobbying;
3. Membership in national delegations;
4. Participation in review and enforcement procedures;
5. Ensuring transparency and supporting international secretariats; and
6. The capacity of NGOs to effect change in governance and actor attitudes at multiple levels through direct and indirect influence.

**3 This question is in regards to environmental NGOs and the decision-making process around governance in the Southern Ocean, including the Whale Sanctuary and Japanese scientific whaling. Which of the following reflects your perception?**

Environmental NGOs have hampered discussion in Commission meetings

Environmental NGOs have contributed very little to the discussion in Commission meetings

Environmental NGOs have contributed significantly to the discussion in Commission meetings

Environmental NGOs have been integral to the discussion in Commission meetings

**4 Thinking on cultural NGOs, such as the Makah Indian Tribe, Alaskan Whalers and the Chukotka people, which of the following most closely reflects your perception?**

Cultural NGOs are important NGOs in their presence at IWC meetings

Cultural NGOs are more effective contributors than environmental NGOs to Commission work or meetings

Cultural NGOs are not important in the work of the Commission as independent bodies

Cultural NGOs provide some useful contributions to Commission meetings

Cultural NGOs hamper discussion in the Commission meetings

**5 Thinking on industry NGOs such as Japan Fisheries and the IWMC World Conservation Trust, which of the following most closely reflects your perception?**

Industry NGOs are important NGOs in their presence at IWC meetings

Industry NGOs are more effective contributors than environmental NGOs to Commission work or meetings

Industry NGOs are not important in the work of the Commission as independent bodies

Industry NGOs provide some useful contributions to Commission meetings

Industry NGOs hamper discussion in the Commission meetings

**6 In general, circle which of the NGOs fit the following criteria:**

**Very effective** in supporting the work of the Commission

IFAW	WSPA(WAP)	Greenpeace	IUCN	WWF
------	-----------	------------	------	-----

**Effective** in supporting the work of the Commission

IFAW	WSPA(WAP)	Greenpeace	IUCN	WWF
------	-----------	------------	------	-----

**Somewhat effective** in supporting the work of the Commission

IFAW	WSPA(WAP)	Greenpeace	IUCN	WWF
------	-----------	------------	------	-----

**Not at all effective** in supporting the work of the Commission

IFAW	WSPA (WAP)	Greenpeace	IUCN	WWF
------	------------	------------	------	-----

**Occasionally effective** in supporting the work of the Commission

IFAW	WSPA(WAP)	Greenpeace	IUCN	WWF
------	-----------	------------	------	-----

## Appendix 3: 2014 IWC and CCAMLR interview questions for NGO representatives

### IWC2014 Interview questions

1. Name
2. Organisation
3. Role
4. Length of involvement with organisation
5. Length of personal involvement with IWC
6. Activities
  - a. Scientific contributions?
  - b. Capacity building
  - c. Funding
  - d. Media
  - e. Monitoring and evaluation
  - f. Liaison with states or other NGOs
  - g. Lobbying
7. Which bodies of IWC do you engage with?
8. View of NGO involvement in IWC – how and why is it important?
9. Has your organisation played a decisive or influential role in any decisions of state parties or the IWC?
10. What was the agenda for your organisation at the IWC65? How did it differ from previous years?
11. View of, and interaction with pro-whaling NGOs?
12. How do you view the move to biennial meetings in its potential impact on NGO involvement?

13. Has your organisation made material contributions to the development of IWC policies, conservation measures, or contributed to significant events in IWC's history?
14. Do you engage with other RFMOs, conservation organisations or governments on the issue of whales?
15. Does your organisation engage with the idea of the common heritage of all mankind and therefore enable NGO intervention in or presence with international organisations like IWC?
16. Indicate the level of the effectiveness of the relationship of your organisation and IWC in achieving the goals of your organisation
  - a. Very effective; effective; neutral; somewhat effective; not effective at all
  - b. Please discuss the areas of this level of effectiveness
17. Is NGO involvement important at IWC? Is it essential to any conservation issues at IWC?
18. What are the key issues and challenges facing IWC for the next few meetings?
19. Do you believe IWC has the competency to address these issues?
20. Is there potential for greater involvement of NGOs in IWC?
21. What have been the key achievements of your organisation?
22. Reflecting on IWC65, for your organisation what were the key achievements and failures of IWC65?

## CCAMLR2014 Interview questions

1. Name
2. Organisation
3. Role
4. Length of involvement with organisation
5. Length of personal involvement with CCAMLR
6. View of NGO involvement in CCAMLR – how and why is it important?
7. Has your organisation made material contributions to the development of CCAMLR policies, conservation measures, or contributed to significant events in CCAMLR's history?
8. Which bodies of CCAMLR do you engage with?
9. Other RFMOs, etc.?
10. Does your organisation engage with the idea that the Southern Oceans constitute a commons that are the heritage of all mankind and therefore enable NGO intervention in or presence with international organisations like CCAMLR?
11. Questions elicited by responses of interviewee, such as more details of the activities they have engaged in, such as policy or science work, lobbying, campaigning, working with state parties outside the meeting or delegations during the meeting.
12. Place the effectiveness of the relationship of your organisation and CCAMLR in achieving the goals of your organisation
  - a. Very effective; effective; neutral; somewhat effective; not effective at all
  - b. Areas of effectiveness
13. Is NGO involvement important at CCAMLR? Is it essential to any conservation issues at CCAMLR?
14. What are the key issues and challenges facing CCAMLR?
15. Do you believe CCAMLR has the competency to address these issues?
16. Is there potential for greater involvement of NGOs in CCAMLR?

## Appendix 4: South Atlantic Whale Sanctuary promotional banners at the IWC2016



Image 9.1 South Atlantic Whale Sanctuary promotional banners at IWC2016; source: the author

## Appendix 5: NGOs in the CAMLR and Whaling Commissions

Legal status; country of incorporation	Private / Funding	Membership
<b>ENVIRONMENTAL NGOS</b>		
<b>Antarctic and Southern Ocean Coalition (ASOC)</b>		
United States; <i>US Code</i> , 1947, section 501(c)(3).	Private initiative with no government affiliation; funding from member NGOs and bodies.	Other environmental NGOs.
<p><i>Purpose:</i></p> <p>‘To preserve the Antarctic continent and its surrounding Southern Ocean; to ensure that the world’s last unspoiled wilderness survives intact for future generations.’<sup>853</sup></p>		

<sup>853</sup> ASOC, *About* (2019) <https://www.asoc.org/about>.



Legal status; country of incorporation	Private / Funding	Membership
<b>Centro de Conservación de Cetacea (CCC)</b>		
Chile; not for profit/non-governmental. <sup>854</sup>	Initiative of private individuals; <sup>855</sup> funding comes from donations, membership fees and government grants. <sup>856</sup>	Not governmental; otherwise unspecified beyond 'team of professionals and experts'.
<i>Purpose:</i> <ul style="list-style-type: none"> <li>- Promote effective management, conservation and marine protection policies.</li> <li>- Develop non-lethal research programs on cetaceans and their maritime ecosystems, with special emphasis on endangered species.</li> <li>- Identify and evaluate anthropogenic impacts on cetacean populations and propose mitigation measures.</li> </ul>		

<sup>854</sup> Society for Conservation Biology, 'Role of Cetaceans in Ecosystem Functioning: Defining Marine Conservation Policies in the 21<sup>st</sup> Century' (26 July 2017, 28<sup>th</sup> International Congress for Conservation Biology) *Workshop Report* 14.

<sup>855</sup> Centro de Conservación Cetacea, Directora Ejecutiva del Centro de Conservación Cetacea de Chile Galardonada por la Sociedad de la Biología de la Conservación por sus destacados logros en conservación marina (02 August 2015) <http://www.ccc-chile.org/articulo-15-1161-020815-directora-ejecutiva-del-centro-de-conservacion-cetacea-de-chile-galardonada-por-la-sociedad-de-la-biologia-de-la-conservacion.html>.

<sup>856</sup> Lester M Salamon, 'Chile's Civil Society Sector in Comparative Perspective' (Lecture delivered in Santiago, Chile, 26 September 2017) <https://politicaspUBLICAS.uc.cl/wp-content/uploads/2017/09/3.-PRESENTACION-INTERNACIONAL-LESTER-SALAMON.pdf>.

Legal status; country of incorporation	Private / Funding	Membership
<ul style="list-style-type: none"> <li>- Promote the sustainable development of coastal communities through high quality marine wildlife viewing activities.</li> <li>- Increase public awareness and promote the active and informed participation of citizens / government in the conservation of marine biodiversity as well as promote the reduction of anthropogenic impacts.</li> <li>- Strengthen national and international cooperation in marine conservation strategies.<sup>857</sup></li> </ul>		
<b>Cetacean Society International (CSI)</b>		
United States; <i>US Code</i> , 1947, section 501(c)(3). <sup>858</sup>	Private initiative indicated by legal status; funding from the public.	Members of the public. <sup>859</sup>
<p><i>Purpose:</i></p> <p>'To stop the killing, capture and display of cetaceans (whales, dolphins, and porpoises); encourage human activities that enhance public awareness and stewardship of cetaceans and our marine environment; and collaborate with stakeholders to reduce anthropogenic threats...'<sup>860</sup></p>		

<sup>857</sup> Centro de Conservación Cetacea, *About Us* (no date) [http://www.ccc-chile.org/article\\_view.php?areaID=208&cPath=208&key=455&bRedirectByBeOne=true](http://www.ccc-chile.org/article_view.php?areaID=208&cPath=208&key=455&bRedirectByBeOne=true).

<sup>858</sup> Cetacean Society International, *What is Cetacean Society International* (2018) [http://csiwhalesalive.org/csi\\_about.html](http://csiwhalesalive.org/csi_about.html).

<sup>859</sup> Cetacean Society International, *Donate Now to CSI or Become a Member* (2018) [http://csiwhalesalive.org/csi\\_membership.html](http://csiwhalesalive.org/csi_membership.html).

<sup>860</sup> Cetacean Society International, *About. What is Cetacean Society International* (2018) [http://csiwhalesalive.org/csi\\_about.html](http://csiwhalesalive.org/csi_about.html).

Legal status; country of incorporation	Private / Funding	Membership
ELSA Nature Conservancy (ELSA)		
Japan; <i>Law to Promote Specified Nonprofit Activities</i> (1998) – similar to US 501(c)(3) organisations. <sup>861</sup>	Private initiative indicated by legal status; unspecified.	Members of the public. <sup>862</sup>
<p><i>Purpose:</i></p> <p>‘to protect nature and the environment, from the sky to the ground’ and ‘with the aim of global nature and environmental protection across a broad spectrum’.<sup>863</sup></p>		

<sup>861</sup> Japan NPO Center, *Legal Framework* (2019) <https://www.jnpoc.ne.jp/en/nonprofits-in-japan/legal-framework/>.

<sup>862</sup> ELSA Nature Conservancy, *About Us* (2019) <http://en.elsaenc.net/about-us/>.

<sup>863</sup> ELSA Nature Conservancy, *Home* (2019) <http://en.elsaenc.net/>; ELSA Nature Conservancy, *About Us* (2019) <http://en.elsaenc.net/about-us/>.

Legal status; country of incorporation	Private / Funding	Membership
Friends of the Earth (FoE)		
Various, including Australia, <i>Australian Charities and Not-for-profits Commission Act</i> 2012 (Cth) and United States; <i>US Code</i> , 1947, section 501(c)(3).	Private initiative indicated by legal status; no government membership; funding from various sources but no government funding. <sup>864</sup>	Members of the public, also private affiliate organisations. <sup>865</sup>
<p><i>Purpose:</i></p> <p>Relevant to the CAMLR Commission and Whaling Commission, 'FoE understands that in an era of globalisation and international environmental problems, a global and co-operative response is required. FoE [Australia] seeks to develop strong relations with environmental social justice movements in all parts of the world.'<sup>866</sup></p>		

<sup>864</sup> Friends of the Earth (Australia), *Annual Report 2016-2017*, 18-20.

<sup>865</sup> *Ibid* 21.

<sup>866</sup> *Ibid* 2.

Legal status; country of incorporation	Private / Funding	Membership
Greenpeace		
Various, including Australia, <i>Australian Charities and Not-for-profits Commission Act</i> 2012 (Cth) and United States; <i>US Code</i> , 1947, section 501(c)(3); Greenpeace International is incorporated in the Netherlands. <sup>867</sup>	Private initiative indicated by legal status; <sup>868</sup> Greenpeace International receives funding from other Greenpeace entities; <sup>869</sup> subsidiary Greenpeace entities rely on private contributions. <sup>870</sup>	Members of the public. <sup>871</sup>
<i>Purpose:</i> 'to create a green and peaceful world where all life on Earth can flourish.' <sup>872</sup>		

<sup>867</sup> Greenpeace International, Stichting Greenpeace Council and related entities Annual Report 2017, 2.

<sup>868</sup> Weyler, above n 245; Greenpeace, Stichting Greenpeace Council and related entities Annual Report 2017, 2.

<sup>869</sup> Greenpeace, Stichting Greenpeace Council and related entities Annual Report 2017, 2.

<sup>870</sup> Greenpeace Australia, *About Us* (no date) <https://www.greenpeace.org.au/about/>.

<sup>871</sup> Ibid.

Legal status; country of incorporation	Private / Funding	Membership
Global Guardian Trust (GGT)		
Japan; <i>Law to Promote Specified Nonprofit Activities</i> (1998) – similar to US 501(c)(3) organisations. <sup>873</sup>	Private initiative of ‘individuals and corporations ... leaders and experts in natural resource management and other fields’; <sup>874</sup> funding unspecified.	Members of the public and corporations.
<p><i>Purpose:</i></p> <p>‘to ensure that resource uses are the thoughtful and responsible result of reliable data and study. This is not altruism. Ecosystems conservation is critically important to the survival of human beings ... promote the sustainable use of natural resources as a conservation tool.’<sup>875</sup></p>		

<sup>872</sup> Greenpeace International, *Our Values* (2019) <https://www.greenpeace.org/international/explore/about/values/>.

<sup>873</sup> Japan NPO Center, *Legal Framework* (2019) <https://www.jnpoc.ne.jp/en/nonprofits-in-japan/legal-framework/>.

<sup>874</sup> Global Guardian Trust, *Home* (no date) <http://www.ggt.or.jp/en/index.html>.

<sup>875</sup> Ibid.

Legal status; country of incorporation	Private / Funding	Membership
Humane Society International (HSI)		
Various, including Australia <i>Australian Charities and Not-for-profits Commission Act</i> 2012 (Cth) and United States; <i>US Code</i> , 1947, section 501(c)(3).	Private initiative indicated by legal status; public donations, bequests, grants, sales and other. <sup>876</sup>	Members of the public.
<p><i>Purpose:</i></p> <p>Extensive objectives, including ‘protection of all living things from cruelty and neglect’ and ‘to promote the enhancement and conservation of all wild plants and animals.’<sup>877</sup></p>		

<sup>876</sup> Humane Society International, *Annual Report 2018*, 19.

<sup>877</sup> Humane Society International (Australia), *Statement of Objectives* (no date) <https://hsi.org.au/uploads/ckfinder/userfiles/files/Statement%20of%20Objectives.pdf>.

Legal status; country of incorporation	Private / Funding	Membership
<b>Instituto de Conservación de Ballenas (ICB)</b>		
Argentina; 'non-profit civil organisation' <sup>878</sup>	Private initiative indicated by legal status; funding and support received from 'government agencies, foundations, society organizations, academic institutions, companies, media and individuals.' <sup>879</sup>	Volunteers and experts. <sup>880</sup>
<i>Purpose:</i> 'Healthy oceans and a world free of threats and negative human impacts for whales.' <sup>881</sup>		

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<sup>878</sup> ICB, *About* (2018) <https://translate.google.com/translate?hl=en&sl=es&u=https://ballenas.org.ar/&prev=search>.

<sup>879</sup> Ibid.

<sup>880</sup> Ibid.

<sup>881</sup> Ibid.



Legal status; country of incorporation	Private / Funding	Membership
International Fund for Animal Welfare (IFAW)		
Various, including Australia, governed by the <i>Australian Charities and Not-for-profits Commission Act 2012</i> (Cth); and the United States, <i>US Code</i> , 1947, section 501(c)(3) but also (Belgium, Canada, China, France, Germany, India, Kenya, Malawi, Netherlands, Russia, South Africa, United Arab Emirates, United Kingdom, and Zambia). <sup>882</sup>	Private initiative indicated by legal status; funding and support from members of the public. <sup>883</sup>	Members of the public.

<sup>882</sup> International Fund for Animal Welfare (IFAW), *Annual Report* (July 2015-June 2016) 27.

<sup>883</sup> IFAW, *"I Found a Way" to Get Involved* (2018) <https://www.ifaw.org/australia/get-involved>.

Legal status; country of incorporation	Private / Funding	Membership
IFAW cont...		
<p><i>Purpose:</i></p> <p>‘In order to achieve IFAW’s vision of a world where animals are respected and protected, we follow key principles in our hands-on projects with animals and in our advocacy work to secure better animal welfare protection in policy, legislation and society:</p> <ul style="list-style-type: none"> <li>- It should be recognised that animals have intrinsic value and are sentient beings.</li> <li>- Policy should be based on sound science within an ethical framework for animals.</li> <li>- Conservation decisions should be guided by ecological sustainability and biological sustainability, the precautionary principle within an ethical framework for animals.’<sup>884</sup></li> </ul>		

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<sup>884</sup> IFAW, *About IFAW* (2018) <https://www.ifaw.org/australia/about-ifaw>.

Legal status; country of incorporation	Private / Funding	Membership
<b>Organización para la Conservación de Cetáceos /Uruguayan Cetacean Conservation Organization (OCC)</b>		
Uruguay; small non-government organisation. <sup>885</sup>	Private initiative indicated by legal status and history; <sup>886</sup> some funding from other NGOs; <sup>887</sup> and by public donation. <sup>888</sup>	Members of the public; NGO affiliation, indicated by funding sources.
<i>Purpose:</i> promote 'awareness and education programs for the effective conservation of the southern right whale ( <i>Eubalaena australis</i> ) and its coastal marine habitat'. <sup>889</sup>		

<sup>885</sup> Waitt Foundation, *Uruguayan Cetacean Conservation Organization* (2019) <http://waittfoundation.org/rocsplight/organization-for-the-conservation-of-cetaceans-marine-sanctuary-in-uruguayan-waters/>.

<sup>886</sup> IUCN, *A new approach to marine and costal conservation in Uruguay* (2019) <https://www.iucn.org/news/commission-environmental-economic-and-social-policy/201710/new-approach-marine-and-coastal-conservation-uruguay>.

<sup>887</sup> OCC, *Campaign to Return Uruguay to the International Whaling Commission (IWC)* (23 February 2005) <https://ballenafranca.org/article/campaign-to-return-uruguay-to-the-international-wh/>.

<sup>888</sup> OCC, *Contact* (no date) <https://occ.org.uy/contacto.php>.

Legal status; country of incorporation	Private / Funding	Membership
PEW Environment Group (PEW) – PEW is part of the PEW Charitable Trust		
United States, <i>US Code</i> , 1947, section 501(c)(3).	A 'global research and public policy organization, still operated as an independent, non-partisan, non-profit organization dedicated to serving the public.' <sup>890</sup> Funding from donations, grants, investment, program revenue. <sup>891</sup>	Membership is through donation or investment. <sup>892</sup>

<sup>889</sup> OCC, *Contents* (no date) <https://occ.org.uy/index.php#>.

<sup>890</sup> PEW Charitable Trusts, *How We Work* (2019) <https://www.pewtrusts.org/en/about/how-we-work>.

<sup>891</sup> PEW Charitable Trusts, *Form 990, 2016 Return of Organization Exempt From Income Tax* (no date) <https://www.pewtrusts.org/-/media/assets/2018/06/thepewcharitabletrustsyear2017form990.pdf?la=en&hash=8F2696DF99B200B3A423BE7855F146627B21810D>.

<sup>892</sup> PEW Charitable Trusts, *Philanthropic Partnerships* (2019) <https://www.pewtrusts.org/en/about/philanthropic-partnerships>.

Legal status; country of incorporation	Private / Funding	Membership
<b>PEW Environment Group cont...</b>		
<p><i>Purpose:</i></p> <p>PEW Charitable Trusts and its Environment Group focus on improving public policy through ‘rigorous analysis’ and aim to ‘invigorate civic life by encouraging democratic participation and strong communities.’<sup>893</sup> In oceans conservation this ‘includes efforts to create large marine reserves; end illegal fishing; protect key species ... establish policies that protect, maintain, and restore the health of marine ecosystems.’<sup>894</sup></p>		
<b>World Wide Fund for Nature (WWF)</b>		
Various, including Australia, governed by the <i>Australian Charities and Not-for-profits Commission Act 2012</i> (Cth); and the United	Private initiative indicated by legal status; established to work collaboratively with conservationists and conservation organisations. <sup>895</sup> Funding comes from	Members of the public; <sup>897</sup> partnerships with governments, local communities, businesses and individual donors. <sup>898</sup>

<sup>893</sup> PEW Charitable Trusts, *Mission and Values* (2019) <https://www.pewtrusts.org/en/about/mission-and-values>.

<sup>894</sup> PEW Charitable Trusts, *Oceans Conservation* (2019) <https://www.pewtrusts.org/en/topics/oceans>.

<sup>895</sup> WWF, *History* (2019) <https://www.worldwildlife.org/about/history>.

Legal status; country of incorporation	Private / Funding	Membership
States, <i>US Code</i> , 1947, section 501(c)(3)	individuals, in-kind support, government grants, foundations, networks and corporations. <sup>896</sup>	
<p><i>Purpose:</i></p> <p>to advocate ‘for governments and international institutions like the World Bank to adopt, enforce and strengthen policies that promote biodiversity and responsible natural resource management.’<sup>899</sup> Its purpose is also to act as ‘an international fundraising organization to work in collaboration with existing conservation groups and bring substantial financial support to the conservation movement on a worldwide scale.’<sup>900</sup></p>		

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<sup>897</sup> WWF-US, WWF-US 2018 Annual Report, 30.

<sup>898</sup> WWF, *Partnerships* (2019) <https://www.worldwildlife.org/pages/partnerships>.

<sup>896</sup> WWF, *Financials* (2019) <https://www.worldwildlife.org/about/financials>.

<sup>899</sup> WWF, *Influencing Policy* (2019) <https://www.worldwildlife.org/initiatives/influencing-policy>.

<sup>900</sup> WWF, *History* (2019) <https://www.worldwildlife.org/about/history>.

Legal status; country of incorporation	Private / Funding	Membership
Whale and Dolphin Conservation (WDC)		
Primary organisation incorporated as a charity in the United Kingdom under the <i>Charities Act 2011</i> (UK). Also active in Australia governed by the <i>Australian Charities and Not-for-profits Commission Act 2012</i> (Cth); United States, <i>US Code</i> , 1947, section 501(c)(3), Argentina and Germany. <sup>901</sup>	Private initiative indicated by legal status; funding from donations, legacies, merchandise, royalties and investments. <sup>902</sup>	Members of the public and corporate partners, <sup>903</sup> although works collaboratively with governments. <sup>904</sup>

<sup>901</sup> WDC, *Introduction to WDC* (no date) <https://au.whales.org/about-us-2/introduction-to-wdc>.

<sup>902</sup> WDC, *Whale and Dolphin Conservation Report and Financial Statements 2014-2015* (United Kingdom), 13; WDC, *2017 Annual Review* (United Kingdom), 18-19.

<sup>903</sup> WDC, *Supporters View – Why WDC makes a difference* (no date) <https://au.whales.org/about-us-2/supporters-view-why-wdc-makes-difference>.

<sup>904</sup> WDC, *Whale and Dolphin Conservation Report and Financial Statements 2014-2015* (United Kingdom), 1.

Legal status; country of incorporation	Private / Funding	Membership
WDC cont...		
<i>Purpose:</i> 'To reduce the numbers [of whales] killed and the numbers of countries whaling.' <sup>905</sup>		
HYBRID NGOS		
International Union for the Conservation of Nature (IUCN)		

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<sup>905</sup> WDC, *Aims and Objectives* (no date) <https://au.whales.org/about-us-2/wdc-aims-and-objectives>.



Legal status; country of incorporation	Private / Funding	Membership
Switzerland; <i>210 Swiss Civil Code</i> , 1907, Chapter III, Articles 80-89.	Founded by the Swiss League for the Protection of Nature, with the formative cooperation of governments and other conservation organisations in its foundational documents and processes; <sup>906</sup> member contributions.	State; government agency, international non-government organisation, national non-government organisation; indigenous people; affiliate. <sup>907</sup>
<p><i>Purpose:</i></p> <p>Its Constitution notes that its purpose is to ‘encourage and facilitate co-operation between governments and national and international organizations concerned with, and persons interest in, the Protection of Nature.’<sup>908</sup></p>		

<sup>906</sup> International Union for the Protection of Nature (IUPN), *IUPN Established at Fontainebleau 5 October 1948* (no date) <https://portals.iucn.org/library/efiles/documents/1948-001.pdf>.

<sup>907</sup> IUCN, *IUCN Members* (2019) <https://www.iucn.org/about/members/iucn-members>.

<sup>908</sup> *Ibid* Article 1(1).

Legal status; country of incorporation	Private / Funding	Membership
International Wildlife Management Consortium World Conservation Trust (IWMC WCT)		
Canada; non-profit/charitable organisation. <sup>909</sup>	Private initiative indicated by legal status; specific project funding from government grants. <sup>910</sup>	'A variety of governments, governmental ministries, departments, agencies, etc., involved in the management of wildlife, at any level of government, in any sovereign state, country, province, state or territory; regional associations of governments and their agencies involved in the management of wildlife; non-governmental associations or organizations having a direct and

<sup>909</sup> IWMC World Conservation Trust, *Home* (2019) <http://www.iwmc.org/>.

<sup>910</sup> Interview with Interviewee 2 (16 September 2014).

Legal status; country of incorporation	Private / Funding	Membership
		genuine interest in the management of wildlife. <sup>911</sup> Self-identified as an environmental NGO.
<i>Purpose:</i> 'to ensure that international instruments – particularly CITES – have a positive impact on wildlife and natural habitats by instituting management measures and procedures that promote the recovery and conservation of endangered species.' <sup>912</sup>		
<b>INDUSTRIAL NGOS</b>		
<b>Association for Responsible Krill Fisheries (ARK)</b>		
Not for profit under <i>Associations Incorporation Act 1964</i> (Tas); Tasmania,	Initiative of krill harvesting companies; member contributions. <sup>914</sup>	Krill harvesting companies

<sup>911</sup> IWMC WCT, *Membership* (2019) <http://www.iwmc.org/about-iwmc/membership.html>.

<sup>912</sup> IWMC World Conservation Trust, *Home* (2019) <http://www.iwmc.org/>.

Legal status; country of incorporation	Private / Funding	Membership
Australia. <sup>913</sup>		
<i>Purpose:</i>  Facilitate ‘an industry contribution to an ecologically sustainable krill harvest’ with a commitment to long term krill fisheries, obtaining and providing data and information about ‘the fishery, krill stocks and Southern ocean ecosystems’ and contributing to ‘a sustainable krill harvest into the future.’ <sup>915</sup>		
<b>Coalition of Legal Toothfish Operators (COLTO)</b>		
Not for profit; <sup>916</sup> <i>Corporations Act</i> 2001 (Cth); Western Australia; <sup>917</sup> <i>Associations Incorporation Act</i> 1987 (WA). <sup>918</sup>	Initiative of legal toothfish operators; member contributions	Fishing companies from various member states of the CAMLR Commission. <sup>919</sup>

<sup>914</sup> Email from Genevieve Tanner, Public Officer Secretary (ARK) to Lucy Smejkal, PhD candidate, 31 August 2015.

<sup>913</sup> Email from Genevieve Tanner, Public Officer Secretary (ARK) to Lucy Smejkal, PhD candidate, 1 September 2015.

<sup>915</sup> ARK, *Home* (no date) <http://www.ark-krill.org/>.

<sup>916</sup> COLTO, *Articles of Association* (no date) <https://www.colto.org/wp-content/uploads/2019/01/COLTO-Constitution-Jan2019.pdf> 3.1Objects (d).

Legal status; country of incorporation	Private / Funding	Membership
COLTO cont...		
<p><i>Purpose:</i></p> <p>To ‘promote sustainable toothfish fishing and fisheries; facilitate its Members working together and with others, including through continued provision of high quality scientific data to CCALR and other bodies; and to provide effective representation for its Members.’<sup>920</sup></p>		

<sup>917</sup> COLTO, *Certificate of Registration of a Registrable Australian Body* (no date) <http://www.colto.org/wp-content/uploads/2011/12/Australian-Registered-Body-cert.pdf>.

<sup>918</sup> COLTO, *Certificate of Incorporation* (no date) <http://www.colto.org/wp-content/uploads/2011/08/Certificate-of-Incorporation.pdf>.

<sup>919</sup> COLTO, *Members* (no date) <https://www.colto.org/about-us/members/>.

<sup>920</sup> COLTO, *Mission* (2013) <https://www.colto.org/about-us/mission/>.

Legal status; country of incorporation	Private / Funding	Membership
<b>International Coalition of Fisheries Association (ICFA)</b>		
Recognised as an NGO. <sup>921</sup> No indication of state of association or incorporation.	Corporate initiatives to provide representation of fisheries interests; membership funding. <sup>922</sup>	National fish and seafood industry trade associations. <sup>923</sup>
<p><i>Purpose:</i></p> <p>‘to provide decision-makers a unified voice on global fish and seafood issues. ICFA members advocate policies for the long-term sustainable use of living marine resources for the benefit of global food security and prosperity. ICFA members are deeply committed to science-based and fully participatory fishery conservation and management processes.’<sup>924</sup></p>		

<sup>921</sup> National Fisheries Institute, *International Coalition of Fisheries Associations* (2019) <https://www.aboutseafood.com/international-coalition-of-fisheries-associations-3/>; Union of International Associations (UIA), *International Coalition of Fisheries Associations (ICFA)* (2018) <https://uia.org/s/or/en/1100054791>.

<sup>922</sup> National Fisheries Institute, *International Coalition of Fisheries Associations* (2019) <https://www.aboutseafood.com/international-coalition-of-fisheries-associations-3/>.

<sup>923</sup> Ibid.

<sup>924</sup> Ibid.

Legal status; country of incorporation	Private / Funding	Membership
<b>Japan Fisheries Association (JFA)</b>		
Japan; unclear, but 'business' of the JFA is to act within the private and government sectors to promote fisheries and fisheries interests. <sup>925</sup>	Corporate and individual initiative to provide representation of fisheries interests; membership funding.	400 members; fisheries-related associations, private companies and individuals
<i>Purpose:</i> 'to promote the fishing industry and contribute to the economic well-being and cultural heritage of our country.' <sup>926</sup>		
<b>SCIENTIFIC NGOS</b>		
<b>Scientific Committee for Antarctic Research (SCAR)</b>		
United Kingdom, <i>The Companies Acts</i> 1985	National scientific academies or research	

<sup>925</sup> Japan Fisheries Association, *Major Business Activities* (2008) [http://www.suisankai.or.jp/daisui\\_e/gyomu\\_e.html](http://www.suisankai.or.jp/daisui_e/gyomu_e.html).

<sup>926</sup> Japan Fisheries Association, *About Japan Fisheries Association* (2008) [http://www.suisankai.or.jp/daisui\\_e/daisui\\_e.html](http://www.suisankai.or.jp/daisui_e/daisui_e.html).

Legal status; country of incorporation	Private / Funding	Membership
and 2006 (UK). <sup>927</sup> SCAR is a registered company (6564642) and registered charity (1124840).	councils 'of countries that are active in Antarctic research.' <sup>928</sup>	
<p><i>Purpose:</i></p> <p>Initiate, develop and coordinate 'high quality international scientific research in the Antarctic region (including the Southern Ocean), and on the role of the Antarctic region in the Earth system. SCAR provides objective and independent scientific advice to the Antarctic Treaty Consultative Meetings and other organizations such as the UNFCCC and the Intergovernmental Panel on Climate Change (IPCC) on issues of science and conservation affecting the management of Antarctica and the Southern Ocean and on the role of the Antarctic region in the Earth system.'<sup>929</sup></p>		

<sup>927</sup> *Articles of Association of Scientific Committee on Antarctic Research* (May 2018) <https://www.scar.org/library/governance/5116-articles-may18/file/>.

<sup>928</sup> SCAR, *SCAR Member Countries and Unions* (2017) <https://www.scar.org/about-us/members/detailed-information/>.

<sup>929</sup> SCAR, *Welcome to The Scientific Committee on Antarctic Research* (no date) <https://www.scar.org/>



Legal status; country of incorporation	Private / Funding	Membership
Scientific Committee for Oceanic Research (SCOR)		
Maryland, United States, <i>US Code</i> , 1947, section 501(c)(3).	No government membership; funding comes from national membership contributions, grants and contracts from US federal agencies, private foundations and international organizations. <sup>930</sup>	Membership from the scientific community since 1957.
<p><i>Purpose:</i></p> <p>The purpose of SCOR 'is to further international scientific activity in all branches of oceanic research.'<sup>931</sup></p>		

<sup>930</sup> SCOR, *Financial Support to SCOR* (no date) <https://scor-int.org/scor/about/finance/>.

<sup>931</sup> SCOR, *Constitution of the Scientific Committee on Oceanic Research* (no date) <https://scor-int.org/scor/about/constitution/>.

Legal status; country of incorporation	Private / Funding	Membership
<b>Oceanites Inc. (Oceanites)</b>		
United States, <i>US Code</i> , 1947, section 501(c)(3)	No government membership; utilising public donations, government awards and grants from foundations and institutes. <sup>932</sup>	Has private membership from a variety of professional disciplines related to Antarctic research. <sup>933</sup>
<p><i>Purpose:</i></p> <p>To monitor and analyze ‘penguin and seabird population changes across the vast Antarctic Peninsula’. ‘To provide actionable information rooted in independent scientific data and analyses, open to the public, and engaging all members of the Antarctic community.’<sup>934</sup></p>		

<sup>932</sup> Oceanites Inc, *Oceanites Funding* (2018) <https://oceanites.org/oceanites-funding/>.

<sup>933</sup> Oceanites Inc, *Board of Directors and Members* (2018) <https://oceanites.org/board-of-directors-and-members/>.

<sup>934</sup> Oceanites Inc, *About Us* (2018) <https://oceanites.org/about-us/>.

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